IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-117

Supreme Court, U. S.
FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

EDWARD MITCHELL, HOWARD N. SHEPHARD, CALVIN T. REDDEN, JAMES T. OAKES,

Plaintiffs

VS.

BENJAMIN E. CARMICHAEL, Commissioner of Education of the State of Tennessee; MILTON P. RICE, Acting Attorney General and Reporter for the State of Tennessee; THE LINCOLN COUNTY QUARTERLY COURT, composed of LYLE M. FRANKLIN, W.F. PHILPOT, JOE D. TAFT, FRANK E. GRAHAM, HOWARD CAPSHAW, HOWARD MONKS, V.H. BARNES, BILLY PARKER, PAUL BARHAM, CECIL ELLIS, PANGLE STEWART, WM. R. CARTER, FRED YOUNG, J.T. WYATT, WM. S. JAKOVINA, HERMAN MONTGOMERY, L.C. CURTIS, JOHNNY STEVENSON, H. PARSONS, JR., FREEMAN TOWRY, DR, T.H. BULLINGTON, KNOX STEWART, CECIL COOKE, CLYDE FORRESTER, ROY SWEENEY, CON. S. MASSEY, E.C. COLLINS, THOS. E. HUDSON, MELVIN HOWELL, J.T. WALKER, LEONARD MANSFIELD and EARL VANN; TAYLOR CRAWFORD, County Judge and fiscal agent of Lincoln County, Tennessee; the Board of Education of Lincoln County, Tennessee, composed of ERNEST PENDERGRASS, BRIMAGE L. SMITH, WM. T. MEDLEY, JAS. W. SMITH, R. E. BURROUGHS, C.H. HARDY, TULLY BUCHANON, WM. D. JONES and JOHN T. TOWRY; RICHARD WAGGONER, Administrator of the Lincoln County School System, the Board of Education of the State of Tennessee composed of NOBEL C. CAUDILL, T.M. DIVINE, JOHN K. FOLGER, THOMAS E. GERAGHTY H. LYNN GREER, JR., JAMES W. HAWKINS, EDWARD L. JENNINGS, HUGH T. MCDADE ANDREW J. PAYNE, JR., MRS. C. LENTZ STEVENS, F. THORNTON STRANG, MS. DORIS B. TANNER, BENJAMIN E. CARMICHAEL, STEPHEN DENNIS, GEORGE H. BARNES, KENNETH EZELL, DALE GLOVER, JAMES H. JONES, JR., EDWIN H. KENNEDY, FRANK TAYLOR and GOVERNOR WINFIELD DUNN.

Consolidated with

Edward Mitchell, Howard Shephard, Calvin T. Redden, James T. Oakes

VS

(**Same Defendants** except County Judge Taylor Crawford is named as primary defendant instead of Benjamin E. Carmichael Commissioner of Education)

PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

JACK KERSHAW
3710 Lealand Lane
Nashville, Tennessee 37204
Attorney for Complainants

OF COUNSEL:
KIRK C. WAITE
Suite 201
3250 Dickerson Rd.
Nashville, Tennessee

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented for Review	2
Constitutional and Statutory Questions Involved	7
Statement of the Case	7
Argument	13
Conclusion	54
Appendix A	A.1

Authorities Cited

TENNESSEE CODE ANNOTATED

	Page
16-617 (4)	14
23-1101	14-A.14
23-1103	A.14
16-625	14
20-210	14-A.13
20-211	14-A.13
23-1107	14-A.15
23-2003	15
53-3422	16
53-3417	16
53-3415	16
27-120	18-52-A.4
16-330-1-23	A.3, A.4
49-701-2	20-6-9-A.6
49-713	20-A.7
5-1001	20-1-3-6-7-8-9-50
5-1024	A.15
49-201 (5)	21-2-3-5-6-7-8-9-50-51A-4
1-303	28
5-1024	27-8
49-102	30-A.6
49-214	30
49-215	30
49-224	30
49-1105	30-A.8
49-105	31-36-A.9
49-604 (B) 1, 2 and 3	31-A.12
49-602 (E) 9 and 10	32
49-1105	36
23-1113	48
17-202-3	53
49-711	A.8
16-624	26-A.13
16-617	A.13

CASES

Shelby County Board of Commissioners v. Shelby Quarterly Court
216 Tenn. 470, 392 S.W.2d 935 (1965) 14

Jack's Cookie Corp. v. Giles County
219 Tenn. 131, 407 S.W.2d 446 (1966) 14

Chamberlin v. State ex rel Scott W. Brown
387 S.W.2d 816 14

Delta Loan Finance Co. v. Long
206 Tenn. 709, 336 S.W.2d 5 14
Adams v. State ex rel Chattanooga Coke
514 S.W.2d 424 15
State ex rel Harbin v. Dunn
39 Tenn. App. 190 18-23
State ex rel v. Safley
172 Tenn. 385 19-23-50
Blonder-Tongue Labs v. University Foundation
402 U.S. 313, 329 19
Crewse v. Beeler
186 Tenn. 475 20-50
State ex rel Harned v. Meador
154 Tenn. 634 22
State ex rel v. Nashvill Baseball Club
127 Tenn. 292, 307 24
Pollack v. Farmers Loan and Trust Co.
157 U.S. 429, 15 S. Ct. 673, 39 L Ed. 759 24
State v. Mathews
143 Tenn. 475, 13 ALR 314 24
Winters v. American Trust
158 Tenn. 479, 14 S.W.2d 740 24
State ex rel Lea v. Brown
166 Tenn. 669, 91 ALR 1246 24
K V O S Inc. v. Associated Press
299 U.S. 269, 57 S. Ct. 197, 81 L Ed 183 24
Katzenberger v. Weaver
110 Tenn. 620 25
Illinois Central R.R. Co. v. Memphis
21 Tenn. App. 327, 110 S.W.2d 352 25
Burns v. Duncan
23 Tenn. App. 374 25
Wilds v. Coggins
496 S.W.2d 496 (1973) 27-50
Board of Park Commissioners v. Nashville
134 Tenn. 612, 629 28
Prescott v. Duncan
126 Tenn. 106 34

Schecter Poultry v. U.S.
295 U.S. 495, 44 S. Ct.837, 79 L Ed. 1570 34
Malone v. Williams
118 Tenn. 390 35
Garner v. Scales
183 Tenn. 577, 194 S.W.2d 452 37
State v. Yoakum
299 S.W. 635 38
Cheatham v. Baker
161 Tenn. 222 38
Citizens to Preserve Overton Park v. Volpe
357 F. Supp 846 (1973) 38
Railroad v. Lee
95 Tenn. 388 38
Sanders v. Carmichael
527 S.W.2d 92 (1975) 44-49
Colburn v. Chatt
2 Shannon 22 (Tenn.) 45
Reams v. Mayor and Board of Aldermen of McMinnville
155 Tenn. 222 45
Pierce v. Society of Sisters
268 U.S. 510 47
Barnette v. West Virginia
63 S. Ct. 1178, 319 U.S. 624 47
Buntin v. Crowder
273 Tenn. 398, 118 S.W. 2d 221 48
Williams v. American Plan Corp.
216 Tenn. 435, 392 S.W.2d 920 48
Engle v. Vitale
370 U. S. 421 48
Flast v. Cohen
392 U.S. 83 48
Evers v. Dwyer
358 U.S. 202 48
Southern v. Beeler
183 Tenn 272, 195 S.W.2d 857 50
Lamb v. State
338 S.W.2d 584, 207 Tenn. 162 51

Joint Anti-Facist Refugee Committee v. McGrath
341 U.S. 123 52
Osborn v. Bank of United States
9 Wheat 738 52
Scott v. McNeal
154 U.S. 34-46 53
Estes v. Texas
381 U.S. 532, 543 (1965) 54
In re Murchison
349 U.S. 133 (1965) 54
Mayer v. Chicago
404 U.S. 189 (1971) 54
Gibson v. Berryhill
U.S. 36 L Ed 2d 488 (1973) 54

INDEX TO APPENDIX A

Constitution of the United States
Page
Art. IV, Section 4 .....13-34-A-1
Amendment 14 .....34-A-1

Constitution of Tennessee
Art. XI, Section 17 13-34
Art. II, Section 17 20
Art. II, Section 2 .....23-A-2
Art. II, Section 1 .....34-A-2
Art. I, Section 8 .....35-A-2
Art. I, Section 1 .....44-A-1
Art. VI, Section 11 .....53-A-3
Art. I, Section 2 ..... A-1
Art. I, Section 5 ..... A-2
Art. I, Section 21 ..... A-2

APPENDIX B (Separately bound)

OTHER AUTHORITIES

Tenn. Rules of Civil Procedure 1208 .....17-A.16
Sedgewick, "Construction of Statutory and Constitutional Law" 28-9
Black-Interpretation of Laws 29
Vanderbilt Law Review, Vol. 24, p. 289 48

PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

OPINIONS BELOW

Only one Opinion has been officially reported in these cases: *Mitchel et al vs. Carmichael et al 522* SW2d *869*. The other opinions of the Supreme Court of Tennessee and the opinions of the Chancellors of Davidson, Lincoln and Giles County of Tennessee are included in the Appendix in accordance with Rule 23 (1) (a) and (i) of this Court.

JURISDICTION

(i) The interlocutory and final orders and decrees sought to be reviewed herein were entered in the following chronological order:

Mitchel vs. Carmichael: an opinion entered in Davidson Chancery; an Interlocutory Opinion by the Supreme Court of Tennessee March 31, 1975; an Opinion of the Supreme Court of Tennessee April 15, 1976 (now styled *Mitchel et al vs Ingram et al)*

In *Mitchel et al vs Crawford et al:* an Opinion by the Chancellor of Lincoln County Tennessee *(reproduced the opinion of the Court of Appeals of Tennessee and a Final Decree entered July 14, 1975;* an Opinion by the Court of Appeals of Tennessee Filed *January 30, 1976;* an order of the Supreme Court of Tennessee denying a Writ of Certiorari from the Court of Appeals April 5, 1976; and an order in the Supreme Court of Tennessee denying a re-hearing April 19, 1976; all of which are in the Appendix along with related opinions.

(ii) The decree of the Court of Appeals of Tennessee January 1, 1976 is the principal opinion on the merits of *Mitchel vs. Crawford*. The Opinion of the Tennessee Supreme Court on a Writ of Error from the Chancery Court of Davidson County is the principal opinion in Mitchel vs.

Carmichael (Ingram). An Order of March 15, 1976 in the Supreme Court of Tennessee granted an extension of time within which to seek Certiorari and Super Sedeas to remove Mitchel vs Crawford from the Court of Appeals to the Tennessee Supreme Court.

(iii) This Court has jurisdiction of this petition pursuant to the provisions of 28 U.S.C. 1257 (3)

QUESTIONS PRESENTED FOR REVIEW

(1) Under the Declaratory Judgment Act of Tennessee, are the requirements of due process of law satisfied, where the Court is duly requested to interpret the constitutionality of specific act (T.C.A. 49-201) by properly defined classes of Taxpayers, Parents, and Children, and the Court, instead of citing precedent wherein the Act has been discussed and evaluated, relies entirely on precedent which does not mention the Act or its *specific* subject matter?

(2) Have the requirements of due process been met where the Court by "remand" removes a suit from the trial court (where by all existing precedent the suit was properly brought) and which presides in the official situs of the principal and real defendant, to another trial court on the theory that the principal defendant (The Commissioner of Education of Tennessee) can "waive" the question of jurisdiction, when the rules of Tennessee Procedure (TRCP 12 .08) specifically prohibits the waiving of jurisdiction by any defendant?

(3) Is a case founded on contract rights (wherein a school teacher under the tenure act sought to name the Commissioner of Education as a party defendant, and this was denied because her contract was, not with him, but the local board of education) — is such a case precedent by any known rules of Stare Deciscis for denying standing to sue to a class of Taxpayers, Parents, and School Children seeking relief under the Declaratory Judgement Act? Is such

limitation on Standing to Sue equal protection of the law?

(4) May the above arbitrary fixing of forum by the Supreme Court of Tennessee be justified by an announcement from the bench that it is done under the "new powers" of the Court where new powers may be created and assigned only by constitutional amendment? And there has been no constitutional amendment but only four acts passed by the legislature (TCA 16 - 330, 16- 331, 16-332, 16-333 (Appendix A. pp 3-4)?

a) The justice who made the above announcement, before his election to the Supreme Court, was president of the Tennessee Bar Association which organization was chiefly instrumental in the passage of the above four pieces of legislation; after remand of *Mitchel vs. Carmichael* to Lincoln County Chancery, a Petition to Re-hear and a Motion to Re-cuse, as to Justice Henry, (the former advocate for Giles County in *Young vs. Warf)* was filed; (April 9, 1975) On May 5 the petition to Re-hear was denied and Justice Henry failed to, or refused, to re-cuse himself; the order of denial was signed "Per Curiam"; has due process here been served? (see Tennessee Court Article VI Paragraph 3 Appendix A 3 and Opinion on Petition for rehearing Appendix B 78).

(5) Has due process been fairly served where one of the justices in a previous suit on the same basic legal questions from another county had been employed by that county as special counsel to argue the case before the Supreme Court of Tennessee? And the former advocate, now Justice, not only fails to recuse himself but joins in and apparently writes an opinion herein (Appendix pp. B 74) which was so highly critical of Petitioners and their counsel that the Opinion could fairly be presumed to have a prejudicial effect on the trial court? Upon final appeal and argument Justice Henry did sua sponte recuse himself (though a motion had been timely filed asking his recusal).

b) After Justice Henry absented himself from the bench was the Court properly constituted when under Tennessee law whereby the Governor is required to appoint a successor in order to have a constitutional Court of five members? (Appendix A-3)

(6) May an Appellate Court effectively ignore and fail to discuss fourteen cited errors of the trial court which are here briefly outlined:

Error No. 1: The learned Chancellor erred in failing to recognize that the County or local School Board has exclusive power to determine school policy (paragraphs 15,16,17 & 22 of Motion for New Trial).

Error No. 2: The learned Chancellor erred in failing to recognize that the Commissioner of Education is an appointee of the administrative department, whose duty is to serve the local School Board, and in all questions of money the Commissioner of Education has fiduciary duties which require full revalation of all factors impinging upon the expenditure of money. (Paragraphs 1, 2, 3, 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26 of Motion for New Trial; Tr. P. 164 11 6-10)

Error No 3: The learned Chancellor erred in failing to apply T.C.A. 49-201 (5) which imposes a duty on the County Court to call a referendum in regard to questions of bond issues for new schools, (Paragraph 4 of Motion for New Trial; Tr. p. 13, 1 19; p. 139) and conceived that he had no authority to require a referendum (Tr. P. 110 11 20-21) and was not interested in improper influence on referendum rights (Tr. P. 139, 1s 20-21).

Error No. 4: The learned Chancellor erred in failing to consider or admit testimony regarding children's welfare and parental preference even though children and parents are parties to this cause (Paragraphs 7,8, 10 of Motion for New Trial, Tr. P. 227, 11s 1-2 — all the testimony of Plaintiffs expert witness).

Error No. 5: The learned Chancellor erred in failing to recognize that citizens and taxpayers who are parties to this cause have a right to challenge decisions of elected boards of administrative agencies where there is an abuse of discretion, or a failure to consider alternatives; (Paragraphs 9 & 21 of Motion for New Trial, Tr. P. 90, 1 10).

Error No. 6: The learned Chancellor's refusal to hear or admit into testimony pertinent facts as to taxpayers; (Tr. P. 27, P. 44, P. 67, 1 14, 18) Petitioners (Tr. p. 23, 24) and children (Tr. P. 67 1 14, 18) constituted *a denial of due process.*

Error No. 7: The learned Chancellor erred in refusing to admit petitions signed by some 4,000 eligible voters and addressed to the County Court and seeking a bond issue referendum; these petitions were ignored by the County Court and not answered or replied to. (Tr. P. 23 1 9, P. 24 1 4)

Error No. 8: The learned Chancellor erred in failing to take notice of the compelling and unrebutted testimony of Mr. Pendergrass, long time School Board member (12 years), including 1973, and former Chairman, that: 1) Under the "comprehensive" school plan there would be more bussing (Tr. P. 16, 1 17), that it was educationally unproductive (Tr. P. 70, 1 11;) 2) The Commissioner of Education's office never justified the "comprehensive" school on its merits, if any (Tr. P. 70, 1 21); or compare them to community schools (Tr. P. 74, 1 24); but the commissioner kept insisting on the "comprehensive" school (Tr. P 70, 11 16-18).

Error No. 9: The learned Chancelor erred in refusing to admit the testimony of School Principals Buford Beadle and Joe Vann (Tr. P. 107, 1 7); (Tr. P. 90 1 10); the Court did not comprehend that the testimony of the school principals went to the question, "Was there an independant study by the School Board of rational and supportable alternatives to the "comprehensive" school? Was the community itself

consulted on the desirability of a community school? Their answer was "no".

Error No. 10: The learned Chancellor erred in disregarding the compelling and unrebutted testimony of Squire Thomas Walker of the Lincoln County Court that: 1) The Court was dictated to (Tr. P. 109 l 16, P. 115 l 19) and "had no choice" (Tr. P. 121 11 19-22, P. 130 11 13-16) and that the court was deceived about costs (Tr. P. 133 11 2-13).

Error No. 11: The learned Chancellor erred in refusing to allow interrogotories to be taken of a prominent national authority on education who would testify that there is a valid controversy between the centralized comprehensive school concept and the local community school concept and that no rational decision could be made regarding any given county unless a specific study was made of that county including ascertaining the desires of the parents; (Tr. P. 144 l 15) the error is even more apparent in light of testimony by Dr. Hunter of the Commissioner of Education's office that no such studies were made in Lincoln County (Tr. P. 149 11 14-15) (150-152); Nor were bus route studies made (Tr. P. 172 l 12-17).

Error No. 12: The learned Chancellor erred in failing to grasp that this lawsuit was not just about a school building but about children, parents, taxpayers, and *people* (Tr. P. 177 l 15-17, P 190 11 13-25, P. 191 11 1-7).

Error No. 13: The learned Chancellor erred in failing to pursue to a conclusion the question, "Why, under the community high school plan the county would get *no* vocational aid money, whereas under the "comprehensive" school plan the county would get $2,000,000.00?" (Tr. P. 218 11 9-10, 11 23, P. 219-220 to l 15).

Error No. 14: The learned Chancellor erred in leaving the court room and missing all of the testimony of Plaintiffs expert witness having to do with the existence of a serious controversy in the educational world as to the claimed merits of a centralized comprehensive school as opposed to local

community schools and the lack of study of this question in Lincoln County (Tr. P. 227-230).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent texts of the constitutional and statutory provisions involved are printed in Appendix A hereto pursuant to rule 23 (1) (d) of this Court. They are:

Constitution of the United States: Article IV and the Fourteenth Amendment ¶ 1.

Constitution of Tennessee: (all contained in Vol. 1 Tennessee Code Annotated). Article I Sections 1, 2, 5, 8, and 21; Article II Sections 1, 2, 3, 17 and 29; Article XI Section 17; Article VI Section 3.

Tennessee Code Annotated: Volume 9, 49-201, 49-701 (main Vol. 1966 replacement) 49-102 (1975 Supplement); 49-602 (1975 Supplement to main volume); 49-702 (main volume); 49-713 (1975 supplement); 49-1105 (1975 supplement); 49-105 (in main volume and in 1975 supplement); 49-604 (B) (1975 supplement); *In Volume 2 A* (1975 Supplement) are found 5-1001 and 5-1024; In *Volume 2* is found 1-303 which was formerly Section 13 of the 1932 Code referred to in *State vs. Safley 172 T 389.*

Volume 2, 4-404; *Volume 4,* 16-617, 16-624; 16-625; 16-330; 16-331; 16-332; & 16-333; 20-210; 20-211; *Volume 5,* 23-1107; 23-1101.

The Tennessee Rules of Civil Procedure Rule 12.08 is specifically involved.

STATEMENT OF THE CASE

The Two cases under review here are inextricably involved with three other cases which are referred to in Opinions and Orders herein.

Therefore an accurate assessment of the facts will require knowledge of these cases.

The large and persistent question in all these cases is, "Do Taxpayers and Parents of a given County have constitutional and statutory rights whereby they may have their day in Court to defend their right to a school policy determined by their local school board, free from dictation by the State Commissioner of Education, where they, and the local school board, desired to maintain local community schools, and the Commissioner of Education desired to impose (through his power to control State monies) a centralized consolidated school served by a fleet of buses?"

In 1970 Taxpayers of Giles County Tennessee filed suit in Davidson Chancery Court (Davidson County being the official residence of the Commissioner of Education the real defendant) seeking a Declaratory judgement as to the constitutionality of the Education Act of Tennessee and the manner of its administration by the Commissioner; also in question was the legality of the manner in which the County Court floated school bond issues and the right of the Taxpayers to petition the County Court in an effective manner; that is could the Court re-write a valid petition for a referendum on a school bond issue, a valid subject for referendum, so that it became (as a resolution on the floor of the County Court) a petition for a vote on school policy (Consolidated School vs Community Schools) and hence a non-binding and empty gesture.

The style of this case is *White vs. Warf.* filed June 22, 1970 (Appendix B-1 Complaint and Amendment)

Defendants demurred saying that Complainants lacked standing to sue.

Complainants amended their Bill to add Parents as a class of parties-Plaintiff and the Giles County School Board and the State School Board as parties-defendant.

But this amended complaint (filed September 4, 1970), through clerical error, was never served; nor answered; nor considered by the Court.

The Chancellor allowed the demurrer and dismissed.

The case was appealed direct to the Supreme Court of Tennessee. Justice Creson affirmed in an Opinion (Appendix B20) filed January 17, 1972 in which he discussed the standing of Taxpayers to sue. There was no discussion of Parent's standing. He ruled that the Taxpayers failed to allege that any acts committed by defendants were "illegal" and that this defect was "fatal". This is the sole point decided.

A new group of citizens (Taxpayers and Parents) approached the same counsel (who is counsel for Plaintiffs in all these cases) and a new suit *Young vs Warf* filed May 17, 1972 (Appendix B27, Complaint and Amendment) which very thoroughly alleged illegalities and defined two classes of complainants—Taxpayers and Parents and named the local School Board and the State School Board as defendants; so now there were new parties-plaintiff and new parties-defendant.

Again a Demurrer, or Motion to Dismiss, for lack of Standing and again the Supreme Court affirmed in an Opinion filed April 2, 1973 (Appendix B47) citing the first case (*White vs Warf*) as precedent and declared White to be "res-judicata" as to all "matters and issues" (Appendix B48) even though no matters and issues had ever been discussed.

Then in 1974 a new group of Taxpayers and Parents from another county (Lincoln) filed suit *Mitchel v. Carmichael (Ingram)* in Davidson Chancery, August 29, 1974 (Appendix B49 Complaint) again to seek valid answers to valid questions which had not yet been considered.

Again a Motion to Dismiss for lack of Standing. However this time the Chancellor sua sponte dismissed the Lincoln defendants for lack of jurisdication under a new ruling (*Adams ex rel State vs. Chattanooga Coke)* by the Tennessee Supreme Court which seemed to require that all governmental bodies must be sued in their own official residences.

A new suit was then filed January 1975 *Mitchel et al vs Crawford* (County Judge of Lincoln County) et al (Appendix B-81 Complaint and Amendment)

The original suit remained in Davidson Chancery with only the Commissioner of Education as defendant.

An Interlocutory appeal as to the Davidson Chancery ruling on jurisdiction was taken to the Supreme Court of Tennessee and an Opinion was rendered on March 31, 1975 (Appendix B-74) granting a Trial on the merits in ~~London~~ Lincoln Chancery on the theory that the State was willing to waive the question of jurisdiction. Counsel objected that under Tennessee law Jurisdiction could not be waived by any defendant and to do so was a denial of due process and invited a void proceeding.

However, upon orders of Supreme Court of Tennessee, under its "new powers", an abbreviated hearing was had in Lincoln County Chancery.

A number of errors involving Federal Constitution rights were committed. ~~They are best summarized in (Appendix) in the "Assignment of Errors filed in the Court of Appeals~~: see also preceding pages 4,5,6,+7

Errors Nos. 1, 2, 3, 5, 6, 8, 9, 10, 12 violate the Constitution of the United States of America Article IV Section 4.

Errors Nos. 4, 6, 11, 14, 12, violate Section 1 of the 14th Amendment (the due process clause)

Error No. 7 violates the First Amendment right to Petition.

Error No. 13 violates the equal protection clause of the Fourteenth Amendment.

The Chancelor of Lincoln dismissed Plaintiffs suit and Plaintiffs perfected an appeal to the Tennessee Court of Appeals. The Court of Appeals affirmed in an Opinion filed 1-30-76 (Appendix B82).

Certiorari and Supersedeas was sought in Supreme Court of Tennessee and denied in an Opinion of April 5, 1976. (Appendix B-97)

On the same day that *Mitchel v. Crawford* was argued, *Mitchel v. Carmichael (Ingram),* before the Court on Writ of Error, was heard and on April 15, 1976, affirmed the Chancellor of Davidson who had dismissed as to all parties in his court.

After the Chancellor of Lincoln had ruled (July 14, 1975) and before the Court of Appeals had ruled on the Appeal from Lincoln Chancery a new group of Taxpayers and Parents from Giles County again employed counsel to file a new suit since no final answer had yet been given to questions raised, and the County Court of that county had not yet built a consolidated school or issued bonds for same.

That suit, *Stewart vs. Wakefield,* (Appendix B99) is not presented here for review. But it is necessary to refer to it briefly because it demonstrates the same determination, the same unyielding resolve of the Commissioner of Education to impose a consolidated centralized school system on an unwilling populace; and it was used as concurrent authority by the Supreme Court of Tennessee to rule in the Lincoln County case and the Davidson County case.

The fact situation in Stewart was different on three major points:

1). The then Commissioner of Education (Warf) who initiated the consolidated school plan was very blunt in his letters; there was no possible room left for the School Board to imagine that it was using its own discretion.

2) The School Board adopted an official resolution in which it said that it was recommending a consolidated school because the Commissioner of Education left them no other choice.

3) The people's petition (containing the signatures of almost half the voters of the County) had been fraudulently re-written by the County Attorney before being presented as

a resolution for the County Court to vote on.

The Chancellor without testimony or hearing, ignored the fact that the people of Lincoln had been accorded a hearing in exact parallel situation, and dismissed the suit and made a *finding of fact* that the sole purpose of the suit was for purposes of delay only, (Appendix B/11) and found further that the original case of *White et al vs. Warf et al* was res judicata to all matters and issues. No matters and issues (other than Standing) have ever been discussed in any case in Giles County.

The Supreme Court on April 15, 1976 not only affirmed but went further and said that no cause of action had been stated and upheld the Chancellor in "all things".

A Petition to re-hear was timely filed. (Appendix B/25)

It was denied May 5, 1976. (Appendix B/34)

Leave to file a second Motion to Re-hear was denied May 27, 1976. (Appendix B/47) Mr. Justice Harbison suggested that counsel address a letter to him outlining questions which the Court had not answered. The letter dated May 17, 1976 appears in the Appendix hereto at page B/37

All three of these cases, by a plan approved by the Court, were argued on the same day (April 1, 1976). Counsel on this occasion filed a written motion asking Justice Henry to re-cuse himself (Appendix B/21) because he had represented Giles County as special advocate on this very question (Young vs. Warf) before he became a member of the Court.

The Motion to re-cuse was denied for mootness: Justice Henry on this occasion was said to have already re-cused himself voluntarily. No statement was made as to why he failed to re-cuse himself at the earlier hearing on the interlocutory appeal (supra) and instead took part in writing an Opinion which counsel verily believes to have been (and is) prejudicial to his clients.

After Justice Henry "voluntarily" recused himself from participation in hearing the final argument on the three cases

(Mitchel vs. Carmichael-Ingram, Mitchel v. Crawford and Stewart vs Wakefield), the Supreme Court failed to follow any procedures to appoint a substitute. The Court was only 4 members. The Constitution requires five. The Court was not properly constituted. This violation of due process was pointed out to the Court in a letter May 17, 1976 which is to be treated as a Motion. (Appendix B/35)

ARGUMENT

The broad position of the people of Lincoln County is that they have under the Tennessee Constitution Article XI Sec. 17 and under the Federal Constitution (Art. IV Section 4) a right to local self government, republican in form;

They have been denied that right.

They have been denied the right of petition. (1st Amendment U. S. Constitution)

They have been denied the right to vote on the question of a bond issue for school houses.

They have been denied their proper day in Court for lack of due process because at the hearing the trial court refused to hear testimony on taxpayer cost; refused to allow testimony by nationally known expert witnesses and the Judge left the courtroom on the single occasion when one local expert did testify; refused to perceive unequal treatment under the law or breech of fiduciary trust when the Commissioner of Education promised $2,000,000.00 of extra funds if the County would adopt his plan for one consolidated school, but promised *no* extra funds if the County persisted in maintaining local community schools. These are only a few of the errors committed by the trial court.

The trial courts and the appellate courts of Tennessee have participated in redefining or ignoring accepted principals of Jurisdiction, Stare Decisis, Standing, Res Judicata, and principles of Declaratory Judgement.

These subjects will be briefly argued:

Jurisdiction

The *local jurisdiction* of the court of chancery is subject to rules set out in T.C.A. *16-617,* Sec. 4, of which provides that:

"Bills against non-residents or persons whose names or residences are unknown may be filed in the county in which the cause of action arose, or the act on which the suit is predicated was to be performed, or in which is the subject of the suit or any material part thereof."

And, "person" is defined at T.C.A. *23-1101* to include a *municipal corporation " . . . of any character whatsoever."*

And, counterpart summons may be issued to any other counties of the state for defendants not to be found in the county in which the suit is properly brought. (T.C.A. *16-625, 20-210 & 20-211)*

And, when a declaratory judgment is prayed:

". . . All persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is of statewide effect and is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard. "T.C.A. 23-1107

The above language includes county officials: (Shelby County Board of Commissioners v. Shelby Quarterly Court 216 T 470, 392 S W 2d 935 (1965).

And, class actions are not precluded: (Jacks Cookie Corp. v. Giles County 219 T 131, 407 S W 2d 446 (1966).

In the case of *Chamberlin v. State ex rel Scott W. Brown* (Plaintiffs sought a Writ of Mandamus) 387 S W 2d 816, this Honorable Court quoted with approval *Delta Loan Finance Co. v. Long 206 T 709, 336 S* W 2d 5 which through Mr. Justice Felts stated:

". . . The rule is that a commissioner or head of a department of state government may be sued as such *only* in the county of his official residence; . . . . T.C.A. 23-2003 makes a writ of mandamus against a public official returnable in the county where the office is kept. The situs and office of the Department of Insurance and Banking is in Davidson County. This would be true of each division thereof there being no statutes to the contrary."

By authority of all the above, particularly where declaratory relief is sought, it would seem imperative to first *find the real defendant,* the initiator of the wrong, and bring suit against him at his situs and then issue counterpart summons to all necessary parties wherever they may be found.

In the Mitchel vs Carmichael (Ingram) that is precisely what was done. Petitioners filed in good faith against a state official who is a resident of Davidson County; their interest was real and antagonistic in that they asserted that the statute under which the state official functions was unconstitutional, and that the state officials were administrating the statutes in an unconstitutional manner. The actions of the Lincoln County officials were necessarily connected to and dependant upon the action of the state official and they were necessary parties; without them the state official is as Ortega's "Axeman without trees," — a mere abstraction. The Commissioner of Education can not act except by acting upon these local officials. The test of his administration of the law is not possible unless we have as parties those whom he administers.

The learned Chancellor of Davidson, in dismissing the local officials of Lincoln County (Memorandum of Sept. 30, 1974, quoted supra), misinterpreted the Adams case and misapplied it. (Adams vs State ex rel Chatt. Coke 514 SW² 424.)

Adams did not purport to change the rule of the Chamberlain case or Delta Loan Co. case, and nowhere is

this intent stated. If the Court had intended to reverse these cases, it would presumably have so stated.

All that Adams did and all it purports to do is to say that a plaintiff may not forum-shop by naming a State Commissioner as a real defendant, when, in fact he is not, merely for the purpose of issuing counterpart summons to the real defendant who in the Adams case was an arm of the city of Chattanooga.

T.C.A. *53-3422* plainly states that a municipality may set up an Air Pollution Control Board so long as its standards are not "less stringent" than state standards. That is exactly what Chattanooga did. And, Chattanooga Coke and Chemical Co. tried to challenge the rules of the Chattanooga authorities, which had now valid independant powers, by seeking a mandamus against the *State* Board, clearly, then, not the real defendant. The State Board had obviously not exceeded its powers. In the case at bar, Plaintiffs assert that the State Board of Education has unconstitutional power and has acted unconstitutionally in administering its powers. No such assertion was made in Adams. The statutes creating control over air pollution are directed toward encouraging citizen participation. Appeal procedures are set up, T.C.A. 53-3417. Rules and Regulations are the product of public hearings, T.C.A. 53-3415. Actual power resides *in the community*. If the citizen feels abused in a community such as Chattanooga where local authorities exercise control *independant* of the State Board, then the citizen must reasonably complain in the local forum in the manner prescribed.

In the instant case the opposite is true. It is the state power — the State Commissioner of Education who is oppresive; who, with the State Board, promulgates his own rules with no public hearings; it is the State Commissioner of Education who dictates policy to the local Board of Education. The people are not abused by their county board, but by the State Commissioner; there is no provision for a

public hearing; therefore, their only recourse is an action in Chancery at the situs of the state official against whom they complain.

The Delta Loan case plainly states that the situs of (a state commissioner) and official residence is *local like that of a municipal corporation* — and a commissioner or head of a department of state government may be sued as such *only* in the county of his official residence and a number of cases have held that such a suit may *not* be maintained as a transitory action in another county. (Cases cited. Emphasis supplied)

And yet that is exactly what the Tennessee Supreme Court has done under claimed "new powers" (page 2, 1 29, Mitchel v. Carmichael Opinion, March 31, 1975. Appendix _____) in the case at bar. The Tennessee Supreme Court at page 3 of the same Opinion supra speculates that:

> "Where, however, there are bona fide and material local defendants resident in the county of suit, rather than immaterial or token defendants, it may be possible to bring state officials into the county by counterpart service of process. In all events, in the present case, the state officials have willingly submitted to the jurisdiction of the Lincoln County Chancery Courts, and have stated at the bar of this Court that no issue will be raised in those proceedings as to such jurisdiction or as to the validity of any judgment which may be rendered by that Court, insofar as the matters of venue and jurisdiction are concerned."

The Tennessee Supreme Court overlooks rule 12.08 T.R.C.P., (Appendix _____) wherein it is clear that a defendant may not "waive" the question of jurisdiction; that question may be raised at any time sua sponte by any competent court and may not be ignored by the court if brought to the court's attention by any party.

Petitioners herein respectfully suggest that there is present here a new question. Nashville v. Webb and cases following

state that cases against municipalities and counties are local in nature and must be filed in the local forum. On the other hand, Chamberlain & Delta Loan state that state officials sued in their official capacity must be sued at their official residence "like a municipal corporation." What happens when both a municipality or county and a State Department (as here) are defendants in the same suit? Which situs is honored? It can't be both. The Tennessee Supreme Court has refused to answer that question; under T.C.A. 27-120 that court is required to give an opinion in writing — "stating the points of law on which their action is based."

Petitioners respectfully suggest that the perpetrator of the act complained of is the *real* defendant and it is he who must be sued at his official residence. If the wrongful use of power begins in the state official's official residence, which is Davidson County, then that is where the jurisdiction lies and nowhere else. And the Tennessee Supreme Court may not change this fact by asserting "new powers" (Appendix B75#3) it does not have. The powers of this court are limited by the Constitution of Tennessee and may not be enlarged by the Court, the Legislature, or the Governor; only by a Constitutional Amendment, and the Constitution has not been amended. (See T.C.A. 16-330-1-2-3)

It follows that the hearing had in Lincoln Chancery in Mitchel v. Crawford is void and of no effect.

The Right to Referendum

One of the important questions in this cause is: Do citizens have a statutory right to vote on a bond issue for school buildings and must the County Court present such a question to the voters for referendum?

In *State* ex rel *Harbin* v. *Dunn*, 39 Tenn. App. 190, Judge Felts, in an opinion subsequently expressly approved by this Court, wrote at length upon the rule that a prior decision is not authority invalidating other law unnoticed and not expounded upon by the Court in its decision. This is an essential rule, because some cases are briefed and argued

more thoroughly than others, and in some cases a court may overlook a conflicting rule of law not brought to its attention. But for the rule expounded in the *Harbin* decision, there would be no law—there would only be conflicting rules of law demanding opposite decisions under a single set of facts.

Petitioners are aware of the Tennessee Supreme Court decision in *State* ex rel. v. *Safley*, 172 Tenn. 385, holding county courts not obligated to submit the question of bond issuance to the electorate. Petitioners assert that in that decision, the State Court overlooked legal principals, which command a different result. Petitioners assert that they, as litigants who were not parties to the *Safley* case, have a right under the requirements of due process of law, to make these contentions, though they are squarely against the decision in the Safley case, *Blonder-Tongue Labs* v. *University Foundation*, 402 U.S. 313, 329. Clearly, unless such contentions presently made, if they are correct, be permitted to prevail in spite of the conflicting *Safley* decision, the judicial obligation to hear these contentions is but an idle ceremony; and the Due Process and Law of the Land provisions of our Constitutions do not concern themselves with meaningless ceremonies.

Appellants assert that codification in itself is not an original enactment of law. Codification does not, nor is it designed to, change law. It rearranges. It alphabetizes. It assigns new section numbers. But it does not have the purpose of changing the substantive content of law. In Tennessee, if a codification so arranges previous statutes that their meaning is changed, such changed meaning, Petitioners assert, cannot be given effect, or the codifying act will itself be unconstitutional because it will thereby encompass two subjects, the codifying and re-arranging of prior statutory law and changing the meaning of, or amending, part of that prior statutory law. Such would also be beyond the scope of the captions customarily used in codifying legislation, and would violate the very purpose of both these requirements of the Constitution of Tennessee, to

assure that the legislative power would be exercised only by the legislature, and that legislators would be fairly apprised of the content of the measures upon which they were asked to vote. In a codification or re-codification of previous statutes, legislators cannot be expected to compare them with all prior statutes and to ferret out changes in meaning which may be accomplished by printing previous provisions in a single enactment. Petitioners insist that the content of statutory law can be determined only by noting its course of development, rather than concentrating upon the fact that it is re-printed in a single re-enactment; unless this be done, the re-printing changes the content of the statutory provisions, contrary to the provisions of Article II, Section 17, of the Constitution of Tennessee.

The powers of the County Court except for a few powers now relatively insignificant which are vested in it by the Tennessee Constitution, are powers which must find their source in legislative enactments, *Crewse* v. *Beeler,* 186 Tenn. 475.

In 1911, by enactments now codified in T.C.A. 49-701 and 49-702, et seq., the quarterly county courts were authorized by majority vote to issue bonds for purposes which included the erection and repair of school buildings. T.C.A. 49-713. This authorization vested the power solely in the quarterly county courts and required no submission of the issues to the qualified voters of the county.

But in 1923, by enactment now codified as T.C.A. 5-1001, this power of the county court was altered. The Legislature decreed: "Any bonds authorized to be issued by any of the counties, . . . shall *only be upon an election* to be first held by the qualified voters of such county and the assent of a majority of the votes cast in said election; . . ." (Emphasis added). Contrary to the implication in the *Safley* decision, supra, the new 1923 legislation did not involve an *implied* repeal of any of the previous statutory authorizations specially empowering the counties to issue bonds for special

purposes. Instead, it *expressly* altered all these prior grants by expressly requiring that after county court authorization, the issue should be submitted to the electorate before the issuance of bonds. The statute does not appear to authorize the issuance of any bonds, but instead, to change the requisite system for authorizing the issuance of bonds in every case. The statute contained two express exceptions, stating that it should be inapplicable to bond authorizations to replace a destroyed courthouse or to take advantage of enabling acts for state and federal aid for the construction of federal roads. Under the doctrine of *expressio unius,* this implies that there were no other exceptions and indeed, to construe T.C.A. 5-1001 as inapplicable to special statutory authorizations would appear to make it inapplicable to anything, because it sought to modify an existing power rather than to create a new power. Where the county court had had the power to issue bonds solely upon its own authority under statutes, the Legislature now enacted that this power might be utilized only upon "an election . . . and the assent of a majority of the votes cast . . ." This in no way deprived the county court of the authority to resolve that bonds should be issued. It merely changed the legal effect of their authorization by requiring an additional authorization by the voters of the county before the magisterial resolution should empower the county to actually issue the bonds.

But still, under these statutes, and primarily under the original 1911 enactment, the County Court was merely given the power, the discretion to take or withhold action, to fulfill a public need, so that the discretion was for the county court to exercise.

But where the Court earlier had the discretion, in 1925, by an enac ment codified as T.C.A. 49-201, the Legislature imposed certain mandatory duties upon the quarterly county court, including the duty to provide funds to erect a suitable building for one first-class four-year high school, the duty to provide the *minimum of one county high school not being*

qualified by any bonding provision, and such duty being enforceable by mandamus, *State* ex rel. *Harned* v. *Meador,* 154 Tenn. 634. But there were other mandatory duties imposed upon the quarterly county court by this enactment, including the duty "to submit to the voters of the county, . . . the proposition to issue bonds for the purpose of purchasing ground, erecting and furnishing school buildings, . . ." T.C.A. 49-201 (5). By the plain language of this enactment, there was imposed upon the county court the mandatory duty of submitting any bonding proposition for school buildings to the voters of the county; this was not simply a grant of power, because the county courts already had this power, but it was expressly phrased as an imposition of a duty upon the County Court. So that if magistrates should introduce a proposal to authorize a bond issue, the court was required by statute to submit this to the people. But the statute did more than this, and imposed the duty upon the Quarterly County Court "upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith."

So as these statutes gradually evolved, Petitioners insist that they first gave the Quarterly County Court the authority and sole discretion to authorize bonds for the construction of school buildings, they then rendered such magisterial authorization ineffective until it should be approved by the voters, and then added to the discretionary authority the positive duty to submit to the people any proposition for the issuance of school bonds and then to issue those bonds, even contrary to the majority vote of the members of the Quarterly County Court, if the majority of the people should authorize it. Here is a complete statutory scheme, designating and empowering the court to authorize bond issuance, but protecting the people against possible excesses by the court and then protecting the people against possible penuriousness by the court.

Petitioners respectfully submit that this Court's prior

decision in the *Safley* case, supra, is not disposative of these issues, because it *did not note* the mandatory commands of T.C.A. 49-201, nor the fact that T.C.A. 5-1001 was an express change in bond-issuing procedure rather than *possibly* an implied repeal, nor the fact that under the statutory construction canon of *expressio unius,* the statute could not be inapplicable to school bond issues. Petitioners respectfully submit that under the rule that all statutory provisions on the same subject should be construed together, the construction Petitioners suggest is the only one that will give full effect to *all* the enactments which are of equal dignity, and that this construction is in fact not a construction, but only an application of the plain words of each of the statutes in their natural meaning.

Petitioners further assert that the plain meanings of these statutes cannot be changed by the mere act of codification, because the same would constitute a codification with a super-addition of an alteration of the plain meaning of the substantive provision of the statutes. Petitioners further respectfully submit that judicial interpretation of such statutes which is contrary to the plain meaning of the statutes cannot change their meaning, because this would be a judicial amendment of the statute, the Constitution of Tennessee prohibits the courts from exercising the powers of the Legislature, Art. II, 2, and the Supreme Court of Tennessee should seek to stringently avoid even accidentally legislating under the guise of interpretation.

Petitioners therefore respectfully submit that an attempted bond authorization is itself an illegal act, without submission of the issue to the qualified voters of the county, and that such illegal act is injurious to the petitioners as taxpayers and parents, and a violation of their constitutional rights.

Stare Decises

and

An Analysis of State ex rel vs Safley 172T385

In *Harbin* vs. *Dunn* 39 TAP190, Judge Felts at page 212,

paragraph 18, in discussing the principle of *stare decisis* in Tennessee said:

"Of course a decision of our Supreme Court is an imperative precedent for us as an intermediate appellate court; but a decision is a precedent only for the point or points decided."

He went on to quote *State* ex rel vs. *Nashville Baseball Club* 127 T 292, 307, in which the court through Mr. Justice Green said:

"It is a familiar principle that *stare decisis* only applies with reference to decisions *directly upon the point in controversy*. The point in controversy here as to the proper passage of this bill by the Senate was not considered in Hayes v. State.

"Only the points in judgment arising in a particular case before the court are precedents for future decisions. Clark v. Lary, 3 Sneed, 77; Louisville, etc., R. Co. v. (Davidson) County Court, 1 Sneed, (637) 638, 62 Am. Dec. 424.

"The Supreme Court of the United States has said:

" 'Doubtless the doctrine of *stare decisis* is a salutary one and to be adhered to on all proper occasions; but it only arises in respect of decisions directly upon the points in issue.' Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 574, 15 S.Ct. 673, 687, 39 L. Ed. 759."

To the same effect, see: State v. Matthews, 143 Tenn. 463, 475, 226 S.W. 203, 207, 13 A.L.R.314,319; Winters v. American Trust Co., 158 Tenn. 479,493,14 S.W. 2d 740,743; State ex rel. Lea v. Brown, 166 Tenn. 669, 678, 64 S.W.2d 841, 843, 91 A.L.R. 1246.

Judge Felts then went on to say in paragraph 19 that:

"A question which *merely lurks* in the record, neither brought to the attention of the Court nor ruled upon, is not to be considered as having been so decided as to constitute a precedent. KVOS, Inc., v. Associated Press, 299 U.S.

269, 279, 57 S. Ct. 197, 81 L. Ed. 183, 188. Where an applicable *rule (statute* or *common law)* is *overlooked* in the decision of a case, *such decision in not authority* for the proposition that the rule is not to be applied in like cases in the future. Katzenberger v. Weaver, 110 Tenn. 620, 635, 636, 75 S.W. 937, 941; Illinois Cent. R. Co. v. City of Memphis, 21 Tenn. App. 327, 336-346, 110 S.W. 2d 352, 357-363; Burns v. Duncan, 23 Tenn. App. 374, 388, 133 S.W. 2d 1000, 1008. (emphasis added).

"Upon these authorities, we think the McLendon case and like cases above referred to are not precedents for our decision in the case before us. All of them applied the common-law rule that sureties on an officer's bond are liable for an act by virtue of office, but not for an act under color of office. In none of them was this statute, which declares such sureties liable for both classes of acts, considered or mentioned. The only point decided in any of those cases was the issue of common-law liability of the sureties; the point in controversy here as to their liability under this statute was not considered or referred to in any of the cases; and none of them is a precedent or authority for our decision of this question. This being so, it is our duty to follow the rule of the statute rather than the rule of those cases."

As it was the Court's duty, in Harbin vs. Dunn, to follow the statute that applied rather than a line of cases in which the applicable statute was neither "considered or mentioned," so it is the duty of the Trial Court to follow the statute in question (T.C.A. 49-201), rather than the Safley case which does not consider or mention T.C.A. 49-201.

The Tennessee Court of Appeals (opinion, Appendix B 32) clearly erred in citing Safley simply because it covered the "subject matter at hand" in general terms. This is not enough; the "subject matter" must be specifically defined, named, and determined. *T.C.A. 49-201* is not "mentioned or considered" in Safley. It can not be precedent for an interpretation of that statute.

Even the "general subject" of the statute which is discussed and determined (T.C.A. 5-1001, 1923) is different from T.C.A. 49-201. T.C.A. 5-1001 *is* general in application for it refers to all bonds or "any bonds," and requires that they shall be issued "only . . . upon an election to be first held by the qualified voters of such county . . ." and then certain exceptions are made as to renewal or refunding bonds or bonds for the rebuilding of a destroyed courthouse.

In contrast, T.C.A. 49-201 (5) 1925 is specific. It is the *duty* of the Quarterly County Court "to submit to the voters of the county . . . the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings . . ."

This is positive, specific language; not general language as to "any" bonds except certain named exceptions.

Then the statute goes even further and requires the Court to ". . . upon the affirmative vote of the majority cast in said election *to issue* said bonds in accord therewith."

This is new subject matter not present in T.C.A. 5-1001.

Safley justifies its interpretation of T.C.A. 5-1001 on the grounds that it is of a "general" nature, whereas T.C.A. 49-701 specifically relates to education *but so does T.C.A. 49-201*.

Safley notes that ". . . if there be apparent conflict section 13 (now Sec 1-303) of the Code has controlling application reading as follows:

> *Conflicts* - if provisions of different chapters or articles of the code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the *subject matter* of that chapter or article." (Emphasis supplied)

The question immediately occurs, "What if the subject matter of both statutes are the same?" Here the subject matter of both T.C.A. 49-701 and T.C.A. 49-201 is the funding of schoolhouses by bond issue. Mere classification

into chapters by codifiers can not change that. T.C.A. 49-701 is permissive, only, as to authority to be exercised by the County Court and was enacted in 1911. T.C.A. 49-201 is mandatory as to duties of the Court and requires a referendum to the people, and was enacted in 1925. Are we to believe that mere codification made the 1911 statute more specific and changed its force so as to impliedly repeal a law passed fourteen years *later*? If so, the legislation and Safley both were written by the distinguished legal scholar, Mr. Lewis Carroll. "Safley" perceives the small difficulty of in futuro implied repeal and states the ". . . conflicting sections (i.e. 49-701 & 5-1001) under consideration are parts of the code of 1932, and in this sense were enacted contemporaneously." This is legal fiction par excellent. 49-201 is not mentioned at all.

But even as a convenient, if unbelievable, fiction, Section 13 surely is not applicable here. It is not applicable because in 1957 the legislature *reaffirmed* T.C.A. 49-201. It passed a statute codified as T.C.A. 5-1024 which provided that it shall be "necessary" to have a referendum "only" if within 10 days after a bond issue has been authorized by the County Court 10% of the voters of the County petition the Court to hold a referendum. Section 5-1024 is part of a statute enacted as Chapter 224 of the public acts of 1957 and authorizes the issuance of bonds for public works naming but not limiting thereto more than forty purposes for which the bonds may be issued.

In *Wilds* vs. *Coggins* (A taxpayers suit by the way) 496 S W² 496 (1973): "The Chancelor in his opinion took judicial notice that Chapter 224 of the public acts of 1957 as introduced in the general assembly, had included schools as one of the purposes for which the bonds might be issued under its authority, but that during passage the word "schools" had been deleted."

The Chancelor was affirmed.

Thus we see that the only possible reference of the

assembly to a bond issue on schools had to be to 49-201, the only special school bond statute that made a referendum necessary. T.C.A. 5-1024 was originally designed to modify 49-201 by altering the mandatory referendum requirement by compelling a petition by 10% of the voters to be filed with the County Court requesting a referendum. This change was contemplated to apply to a long list of public works. But during debate "schools" was stricken from the list. The only possible purpose was to leave 49-201 undisturbed. And this action confirms that the Legislative was aware of 49-201 and did not wish to disturb it. No other rational conclusion can be reached. Sec. 13 (now TCA 1-303) and its fiction is rejected as to 49-201.

In support of this sleight of brain, (the Sec. 13 fiction) Mr. Chief Justice Neil in Board of Park Commissioners vs. Nashville 134 T 612 at page 629 is quoted as stating:

> "Now while it is true that the language of Sec. 27 is very broad yet in arriving at the intention of the legislature we are not confined to the literal meaning of words in a single section when they are in conflict with words used in a *later* section devoted to a *special subject* standing apart from the general subject to which the former section is devoted." (Emphasis supplied.)

The above quoted section can not be authority for a *reverse* situation, in Safley, where the *earlier* section is *specific* and the *later* section 5-1001 is *general;* it certainly can not apply to the situation in the case at bar where the earlier section is specific (by Chapter heading only) and permissive only and the later section is specific *in the body of the statute* and mandatory.

Safley does discuss a solution to this sort of problem. It quotes Mr. Sedgewick in his "Construction of Statutory and Constitutional Law" at page 98:

> "The reason and philosophy of the rule is that when the mind of the Legislator has been turned to the details of a subject, and he has acted upon it, a *subsequent statute in general terms*, or treating the subject in a general manner, and *not expressly contradicting* the original act shall not be considered as intended to affect the *more particular* or *positive* provisions *unless* it is absolutely necessary to give the latter act such a construction in order that its words shall have *any meaning at all*." (Emphasis supplied.)

Except for the problem that 5-1001 is more positive than 49-701 even if it is at the same time more general, the above authority might apply as the author of Safley wished. But the Sedgewick passage could *not* reasonably apply to a comparison of 49-701 to 49-201 where both are equally specific and 49-201 is later and more positive, and actually more specific if we consider the four corners of the statute and not chapters headings alone.

Finally, Sedgewick (and also Black on Interpretation of Laws) provides a final exception and caveat and states that the more "particular" statute (if indeed it is) shall take precedence over an earlier general act "unless it is absolutely necessary to give the latter act such a construction in order for its words to have *any meaning at all.*"

The decision of the Court of Appeals of Tennessee in Mitchel vs. Crawford (affirmed by the Tennessee Supreme Court) leaves T.C.A. 49-201 without "any meaning at all"; even though 49-201 is not a general statute, and is a later specific statute, the Court of Appeals' decision has interpreted an earlier statute to have the effect of repealing by implication a later statute equally or more specific and more positive.

The Court of Appeals has emasculated 49-201. It has made it disappear. Whereas, in fact, 49-201 is the culmination of an orderly *development* of the law as we have earlier shown in this argument.

From all the above, by all principles of *stare decisis*, Safley can not be used as precedent for wishing away T.C.A. 49-201.

If policy should seem to require that it is not wise to allow parents and other voters (all products of 100 years of public education) to vote on questions of education then this is a matter for the legislature, not the courts.

Local Self Government
and the
Authority of Local School Boards
and the
Commissioner of Education

The statutes of Tennessee give the primary power and authority to run our public schools to local boards of Education. In practice, however, the Commissioner of Education and his agents of the state exercise dictatorial power over the local boards by power of the purse.

T.C.A. 49-102 states that, "any local school system shall be administered by (1) a local board of education and (2) a superintendent or director."

T.C.A. 49-214 states that the duties of the local board shall include the duty "to manage and control all public schools established or that may be established under its jurisdiction."

T.C.A. 49-215 states that the local Board of Education, "shall have the power to make consolidation of two or more schools whenever in *its judgment* the efficiency of said schools would be improved thereby."

T.C.A. 49-224 states that it " . . . shall be the duty of the Board of Education to assign to its superintendant . . ." certain duties including at paragraph seven, " . . . the general supervision of all schools . . . " and at paragraphs 17, 18, 19, and 20, to make certain reports to *local* authorities.

T.C.A. 49-1105 provides that each county in the state shall have at least one senior high school which shall offer a "full course of study" approved by the State Board of Education and that ordinarily there shall be at least 300 students in said

school, but there may be less and power of consolidation enjoyed by the local school board is specifically preserved. There are other provisions not relevant here.

From all of the above, it would seem clear that public schools by law are operated and run by local school boards.

> "The County Board of Education has exclusive management and control of the county schools . . . " Benson v. Hardin County (1938) 173 T 246, 116 SW 2d 1025.

So much for the law. Actually, the local boards operate subject to the approval of the Commissioner of Education and the State Board of Education. No major decision is made without state approval and direction.

What are the statutory powers of the Commissioner of Education and the State Board of Education?

T.C.A. 49-105 sets out the powers and duties of the Commissioner. He is Chairman and voting member of the State Board of Education. He has wide appointive power subject to approval by the Governor. He himself is appointed by the Governor.

The Commissioner of Education is given power "in his discretion" to "enforce" the Rules and Regulations which he and his board have created (under authority of T.C.A. 49-108).

T.C.A. 49-604 (B) 1, 2, and 3 provide:

> **49-604.** ANNUAL DISTRIBUTION OF MINIMUM FOUNDATION SCHOOL PROGRAM FUNDS — TIME — REQUIREMENTS.
>
> B. In order for any public school system to receive the state funds appropriated for the minimum foundation school program as determined in 49-603, such system shall meet the following conditions and requirements. In order to enforce the same, the state commissioner of education may, in his discretion, withhold a portion or

all of the state school funds which the system is otherwise eligible to receive.

1. Every school system shall meet the requirements of state law as to the operation of such system.

2. Every school system shall meet the rules, regulations, and minimum standards established by the state board of education for the location, construction and operation of schools.

3. Every school in every school system shall meet the requirements of the state board of education for an approved school. (Acts. 1925, ch. 115, 17; Shan. Supp., 1487a124; Code 1932, 2416; Acts 1972 (Adj. S.), Ch. 693, 6.)

T.C.A. 49-602 E provides:

E. *Capital Outlay*

There shall be included in the minimum foundation school program an amount to be used exclusively for the purpose of capital outlay, including the *purchase* and *improvement* of *sites,* the construction of *buildings,* the remodeling or renovation of buildings, the purchase of equipment for schools and school buildings, and the purchase of pupil *transportation* equipment; for the public schools of this state, which sum shall be distributed by the state commissioner of education as provided in this chapter among the public school systems of the state upon the conditions hereinafter prescribed in this subsection. The amounts of funds so distributed to each school system under the provisions of this subsection may be used in the discretion of the local board of education for the payment or other forms of legal indebtedness of original issue, issued by the system for school capital outlay purposes since July 1, 1947, including school bonds refunding school capital outlay bonds of original issue since July 1, 1947.

AND **E 9** and **10** provide:

9. The state funds for the public schools for capital outlay purposes distributed under the provisions of this Chapter shall be obligated and expended only according to a plan (A) *recommended by the local superintendent of schools and approved by the local board of education,* (b) filed with the state commissioner of education on or before August 1 of the current school year, on forms prescribed by him, and (c) *approved by the state commissioner of education.* However, such plan may be amended during the school year to meet changing conditions or emergencies, but such amendment shall be filed with, and approved by, the state commissioner of education before any funds referred to hereinabove in this paragraph shall be obligated or expended for the purpose of the amendment.

10. The state board of education shall establish *minimum standards* for school *sites,* including locations, schools attendance centers, the construction of *buildings* for school purposes, the *remodeling* or renovation of buildings for school purposes of a capital outlay nature, and for *equipment* for buildings for school purposes. No local board of education shall obligate or expend any state or local school funds for any project of a capital outlay nature which does not conform to the standards adopted by the State board of education as authorized in this paragraph. (Emphasis supplied.)

In a word, the statutes giving power to the local Board of Education and the statutes delegating power to the Commissioner and his board are contradictory.

What is given to the local authorities in principle is taken away in practice, because the one power that counts is given to the Commissioner, and that is the power of the purse. The local board may choose any plan and propose at will, but unless it chooses as the Commissioner and his board wishes it to choose, the state funds are cut off.

The power of the Commissioner is flexible. He may waive

certain requirements or he may not, according to his discretion.

The Commissioner and his board write the Rules and Regulations which have the force of law; the Commissioner may enforce them or waive them for limited times; he appoints advisors, regulators, supervisors, who descend upon the local authorities and tell them what they must do to bring their school system up to minimum standards; the schools are inspected by those who *write* and *interpret* the "standards." If, having promulgated the standards, interpreted them, and judged the schools, the regulators find a matter that displeases them, the Commissioner may then punish by withholding funds. The Commissioner is at once legislature, judge, and administrator.

This is too much power concentrated in one place. It violates Art. II, Sec. I, of the Constitution of Tennessee which provides for the separation of powers, and it violates Art. XI, Sec. 17, of the Constitution of Tennessee which provides that:

> "No county office created by the Legislature shall be filled otherwise than by the people or the county court." (The time at which this section appeared in the Constitution is significant—1870. The state had just endured a long period of centralized "reconstruction" government under which "an orgie of commissioners appointed from Nashville, many of them hostile in sentiment and conduct to the people over whom they were set . . . " Prescott v. Duncan 1912, 126 T 106, and Tennessee wanted no more of that.
>
> And it violates Article IV Sec 4 of the Const. of the U.S., and amendment 14 U.S. Const.

The rule making power used and possessed by the Commissioner is exactly parallel to the situation found in *Schecter Poultry* v. *United States* 295 U.S. 495, 44 S. Ct. 837, 79 L. Ed. 1570 (1935), which states:

> "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation . . . of industry."
>
> "It supplies (Section 3 of the Recovery Act) no standards . . . Instead it authorizes the making of codes to prescribe theirs. The code-making authority thus sought to be conferred is an unconstitutional delegation of legislative power."

And, our own Tennessee case of *Malone* v. *Williams* 118 T. 390 holds that where an official had power to decide, whether or not " . . . in his opinion a nuisance exists on public or private property" and then may proceed to "remove such nuisance" that this was "arbitrary power" and that:

> "No man is wise enough or good enough to be vested with arbitrary power over the property of his fellow citizens . . . provisions which give rise to these powers are in violation of Section 8, Article I of our State Constitution, which provides "that no man shall be taken or imprisioned, or disseized of his free hold liberties or privileges outlawed or exiled in any manner destroyed or deprived of his life, liberty, or property but by the judgement of his peers or the law of the land.' They (the provisions) are, therefore, void." (pp. 417-18)

The power statutes of the Commissioner of Education are on their face too broad and invite abuse of power by the Commissioner.

There is, for instance, no method for review; no hearing authority for citizen complaint. A taxpayer or parent may not at present according to the Supreme Court of Tennessee have his day in court or sue the Commissioner of Education.

That the power is abused is typified by letters from the Commissioner to various school boards across the state. They are letters of command; or they are theatening letters; for example, the letter from the Commissioner of Education

to the School Board of Giles County which states plainly that he, the Commissioner, would not rebuild a burned and destroyed school until "all" schools in the county were brought up to his standards. *Stewart* v. *Wakefield*, Appendix B-99). And this in spite of the plain provisions of T.C.A. 49-1105, which requires of a county only one high school that comes up to the Commissioner's standards. And there, in this same letter, he offers an alternative, ". . . the solution to your problem is one consolidated school . . ." and goes on to tell the School Board if it does not comply that he, the Commissioner, will be forced to cut off funds.

It is the same in Mitchel v Crawford, only the letters are from another Commissioner. They are more adroit, more subtle. But the message is the same. See, for instance, the uncontradicted testimony of school board member Pendergrass at Tr. P. 70, "we had no choice." Or of Squire Walker at Tr. P. 115, ". . . it was like Hitler." Or of Deputy Commissioner Hunter at Tr. P. 149, ". . . we never consult parents." That was in Lincoln County. In Giles County, the school Board officially went on record saying in its minutes that it was submitting a consolidated school plan to the County Court only because of the demands of the Commissioner of Education. Appendix B 33 #4)

Consider particularly here Section 15 of T.C.A. 49-105 which sets the *fiduciary* responsibilities of the Commissioner of Education.

> Whenever it shall appear to the commissioner of education from the report of any school official or from *any other reliable* source that any portion of the *school fund* has been lost, *misappropriated*, or in any way *illegally disposed* of, or not collected, *or is in danger of loss, misappropriation, illegal disposition* or failure of collection, the commissioner may call upon the district attorney or county judge or chairman of the county court, or the county attorney, to protect, recover, or force

> collection of such funds, provided the governor shall first give his approval to such action. This provision, however, shall not prohibit suits by one political subdivision against another political subdivision in the same county, or *against the county*, when the consent of the state commissioner of education, with the consent of the governor and with the approval of the attorney-general, is hereby authorized to employ private legal counsel in order *to protect*, recover, or force collection of any school funds.
>
> The *commissioner* shall have *authority* to send a supervisor or supervisors as herein provided for, to any local school system to *make investigation* of public school accounts, records, and files of any official handling the school funds or administering the public school system, and to enforce all school laws and regulations of the commissioner of education *provided* that this duty of the commissioner shall not be exercised until the *local board of education shall have requested such investigation.* (Emphasis supplied.)

And, *Garner* v. *Scales* (1946), 183 T 577, 194 SW 2d 452 says:

> "The plain purpose of subdivision 15 was to confer upon the *state commissioner of education* the authority to determine when any part of the school fund was in jeopardy *or being wasted* and it was left to him to decide with the consent of the governor when to institute legal proceedings for the protection of school funds, and the legislative intent was to *prevent the squandering of school funds* . . ." (Emphasis supplied.)

And yet with all these clear fiduciary duties neither the Commissioner of Education nor his deputies advised the Board of Education of Lincoln County that cost studies should be made and *alternate* plans should be considered. Never was any cost analysis made of consolidated versus community schools made. Only *one* architect's *estimate*.

This is fiscally irresponsible and capricious and may be corrected by the Court.

"Where it is shown that there is an arbitrary or capricious use of power being excercised by those in authority the Courts will not tolerate the use of such power."

State v. *Yoakum* 297 SW 2nd 635

And in *Cheatham* v. *Baker* 161 T 222 we have:

". . . The county is entitled to have the Commissioner in the exercise of . . . discretion consider and weigh fairly *all* the available information and data as to the feasibility route, cost and availibility of funds, etc. If by a gross or palpable abuse of discretion or a failure to exercise it the county (or its citizens) is deprived of this right it may rightfully resort to the courts for redress."

In *Citizens to Preserve Overton Park* vs. *Volpe* 357 F. Supp. 846 (1973), it was held that an appointed commissioner had a duty to explore and consider alternatives himself:

"In considering whether to route federal hi-way through city park, the Secretary of Transportation was obligated not only to find that there is a feasible and prudent alternative, but also to at least designate such alternative . . ."

Our Commissioner of Education does not feel compelled to perform such duties. If he is not required to do so, he has unconstitutional power; if he is required to do so under his fiduciary duties, it is clear he has failed to perform his duty.

When the law vests discretion in an official, it is the obligation of the official to himself exercise that discretion; an example is seen in the inability of a circuit judge to simply overrule a motion in order that an appeal may be perfected without himself exercising the discretion and judgment as to whether a new trial is required by his personal assessment of the evidence, *Railroad* v. *Lee*, 95 Tenn. 388. It seems clear that if someone should use a gun to compel the Governor to approve a legislative enactment, this would not be a valid

official act, because the Governors personal discretion would not have been exercised.

Citizens, entitled to be governed in accordance with the law of the land when the government seeks to take their property by taxation or to control the education of their children by regulation, *are entitled to have discretionary judgment exercised by the officials in whom the law vests the discretion*. This the Chancellor below never grasped. See his Opinion as quoted at page 6 of the Court of Appeals Opinion, (Appendix B-84 where in the middle of the second paragraph the Chancellor says:

"The real issue in this cause is whether or not Lincoln County schools are meeting a minimum standard for school plants as laid down by the State Board of Education and whether or not there were any deficiencies existing in the local school system prior to the opening of school in September of 1973."

This is not the "real issue." The real issue, or one of them, as stated by Plaintiffs in their Complaint, is: Did the taxpayers and parents of Lincoln County receive the benefit, as was their due, of the free and independant discretion of their School Board and of their County Court?

While the vital question, the existence of viable alternatives, was being testified to by Plaintiffs' expert witness, the Chancellor "went out for a drink" (Tr. P227 17-19), and then on returning gave his opinion from the bench without benefit of record, or transcript, or testimony.

Petitioners contend that they have received no answer to this vital question.

For this reason, Petitioners submit that even if the quarterly county court has authority to authorize the issuance of bonds for school construction without submitting the issue to the people, aside from the mandatory duty to provide the minimum of one high school, Petitioners have a right not to have this new regimentation imposed upon their children until free and independant discretion has been

exercised by those officials in whom the discretion is by law vested, the County School Board and County Court.

Petitioners recognize that when the Legislature by statute imposes a mandatory duty upon the quarterly county court, they are necessarily helpless, even if this is contrary to their wishes, because they must yield to lawful government. But Petitioners insist that when such coercion is inflicted — not by the lawful legislative power of the state, but by one who lacks the authority he claims, that if the County Court or the Board of Education then yield to such coercion without exercising their own judgment and discretion, Petitioners have the right not to have their rights diminished until the local authorities have been freed from such unlawful coercion by declaratory judgment or by injunction, and have exercised their own untrammeled discretion. Such was the insistance in the complaint in these cases.

Unequal Protection of the Law
and the
$2,000,000.00 Question

Perhaps the most obvious and dramatic example of improper influence worked upon the Lincoln Board of Education and the County Court by the Commissioner of Education was the manner in which $2,000,000.00 worth of vocational education money was offered to the county authorities as an inducement to fund the big new consolidated school desired by the Commissioner of Education. This fund of $2,000,000.00 of course, was not his to offer. If Lincoln County had a right to this fund, and it did, it had a right to it in connection with the community school plan as well as with the consolidated school plan. But it was never offered in connection with the community school plan.

The Lincoln County Court Minutes of August 13, 1973, reveal that the meeting of that date was called among other things:

> "To hear, consider, discuss, and act upon a request of the Lincoln County School Board that the Quarterly Court of Lincoln County, Tennessee, authorize a plan of appropriating $2,000,000.00 to construct one comprehensive high school, subject to state approval of a similar amount for vocational instruction."

These same Minutes reproduce a letter from the Commissioner of Education to the Superintendent of Schools of Lincoln County, in which he approves the single comprehensive plan (par. 3 of his letter), and observes that the community high schools plan would cost "at least twice as much ($8,000,000.00) . . . " as the consolidated Plan.

He was thus figuring the outlay to the county for the single comprehensive school plan to be only $4,000,000.00. The county would then receive another $2,000,000.00 for vocational education. No mention is made of the $2,000,000.00 vocational education fund as part of or in connection with the estimated $8,000,000.00 cost of community high schools.

Dr. Wayne Myers clarified the state's position on the $2,000,000.00 question at this same meeting and the Minutes reveal that Squire J. F. Walker moved that the Court appropriate $2,000,000.00 for the "repair and remodeling" of Lincoln County Schools. A discussion followed in which Dr. Myers is quoted thusly:

> "Dr. Myers . . . stated that the state would consider the $2,000,000.00 amount (for remodeling and repair) sufficient *only in connection with a plan for a comprehensive high school.*" (Emphasis supplied.)

No offer of vocational education money was ever made in connection with the community high schools plan.

On August 30, Minutes of the County Court reveal that after much maneuvering and discussing, Squire William R. Carter moved the County Court approve the single comprehensive school plan,

". . . provided and after, and *with the full understanding* that the State of Tennessee make available approximately $2,000,000.00 to totally fund the vocational education of the new senior high school *in accord with the letter* to the Lincoln County School Superintendent *from the Commissioner of Education* dated August 10, 1973 . . ." (Emphasis supplied.)

Before this was voted on, Squire Bullington moved that the,

" . . . Lincoln County Court not appropriate one red cent of this $2,000,000.00 for the Senior High School (the new single comprehensive school) until the state of Tennessee matches it with a firm committment 'tit for tat'; and if and when the state makes a firm committment of an equal amount, we will then appropriate our part, but not until then; let them put their money where their mouths are."

This is a deal. It is an illegal deal. The Commissioner used money to which the county had a right to use as it wished, the Commissioner used it as bait to accomplish what *he* wished.

The Tennessee Court of Appeals overlooked all this and the Tennessee Supreme Court has agreed with the court of appeals. It was brought to the Chancellor's attention and cited as error.

On page 132, of the Tr., the County Attorney at line 11, sets out and admits the deal in his cross examination of Squire Walker.

On page 136, of the Tr., Squire Walker said he did not think the State would contribute $2,000,000.00 vocational education money to the community school plan—the "$8,000,000.00 plan."

The Chancellor expressed concern and on page 138, said: "*I thought it was $2,000,000.00* (contribution) *either way,* (i.e. to either plan) *but that was wrong.*" (Emphasis supplied.)

On page 208, of the Tr., The Superintendent of Schools at line 12, testified that none of the $2,000,000.00 vocational education fund was offered by the state in connection with the community school plan.

On page 216, of the Tr., Assistant Attorney General Lodge advised the Court that the only offer made by the state was $2,000,000.00 in support of the single comprehensive school plan.

The Court of Appeals accepted without question all the Chancellor's interesting conclusions on the above subject. The Chancellor concluded that since by *law* the county was due the $2,000,000.00 vocational education fund in any connection it chose and " . . . the county court certainly had plenty of time between the events of the summer of '73 and the issuance of the bonds in 1974, to find out all the facts, to find out whether or not the county would be deprived of $2,000,000.00 vocational education money if it did not build a comprehensive school." The Chancellor has a wry humor. The Quarterly Court did have the time, but Quarterly Court did not have the source. Its source was the Commissioner of Education to rely on; and his sense of fiduciary duty was overshadowed by his sense of educational desire, not to say passion, and during all this time of pleasant leisure, within which the County Court had to research its rights, the Commissioner of Education was busy with promises which were calculated not to enlighten, but to tempt. He was successful.

The Chancellor and the Tennessee Court of Appeals and the Tennessee Supreme Court are too easily satisfied. The fact that the vocational education money was not available when the community school plan was first offered surely could not mean that it was not available for both plans or either plan when the money did become available. But neither the County Court nor the School Board ever got to exercise their discretion on this point even though the vocational education law (Appendix) specifically

provides for a vocational school *separate* from a "comprehensive" school.

The Right of Petition

The Tennessee Court of Appeals erred in overlooking the fact that the Chancellor (Tr. page 23, 1.10) improperly ruled that 4500 voters of Lincoln County did not have a Right of Petition under Art. I, Sec. 1, of the Constitution of Tennessee and prevented the introduction of their Petitions in testimony.

Standing

For many years the right of taxpayers to sue has been well established in Tennessee.

But the Opinion filed April 15, 1976 in Mitchel vs. Carmichael (Ingram) (Appendix B49) by the Supreme Court of Tennessee has apparently changed all that with no explanation and no rationale. Mitchel vs. Carmichael (Ingram) is, of course, sought to be reviewed here.

The first paragraph of the second page of the two (2) page Opinion contains the entire reasoning of the Court on this point:

"We consider the contentions of the appellant to be without merit. Insofar as their complaint against State officials is concerned, we consider the action to be controlled by the decision of this Court in the case of *Sanders v. Carmichael, 527 SW²92 (Tenn. 1975)*. Further, plaintiffs have had a trial on the merits of the suit which they may not now attempt to relitigate those same issues in this action." Sanders has no relevance to this case.

Sanders is simply a contracts case where a school teacher under the Tennessee Tenure Act sought to preserve her contract of employment rights against the School Board. In the course of the proceedings she sought to name the Commissioner of Education as party defendant because he withheld salary funds from the school system where she worked. Whether this was the result of some personal

vendatta between the Teacher and the Commissioner of Education is unknown to counsel but the Courts of Tennessee found it to be a case based on contracts and nothing more, so she could sue only the party with whom she had a contract which was the local School Board, and not the Commissioner of Education.

Petitioners herein claim no contract rights and have brought a class action under the Declaratory Judgement Act to have the constitutionality of certain statutes (and their administration) construed. A suit based on contracts could not possibly have any relevant precedence in this situation.

The right of taxpayers to bring suit against governmental units in Tennessee and the conditions prescribed for so doing is clearly set out in the Law of Tennessee from as early as 1876. In *Colburn* v. *Chatt,* 2 Shanon 22, Justice Lea held for the court that:

> Any taxpayer may bring his bill in equity to prevent the corporate authorities of a city from acting ultra vires, where the effect will be to impose on him an unlawful tax or to increase his burden of taxation. It is not required that the attorney general file such a bill.

The Court quoted a "distinguished author" to the effect that: "It is the part of true wisdom to keep the corporate (or governmental) wings clipped down to lawful standard."

This case has been followed by a long line of cases and the principle of law is most succinctly stated in *Reams* v. *Board of Mayor & Alderman of McMinnville,* 155 T 222:

> The right of taxpayers to resort to a court of equity to enjoin county and municipal authorities from transcending their lawful powers or violating their legal obligations is well established if such conduct would impose a burden of taxation, for the imposition of such burden is not common to citizens who pay no taxes (citing cases).
>
> The taxpayer may maintain the suit to restrain action of the municipal authorities only when they are acting

illegally and when the effect of their illegal action will impose an additional burden of taxation.

The Plaintiffs in the case at bar fit all the requirements above; they are landowners subject to taxes not suffered by non-landowners; their taxes will be increased by the debt incurred by the proposed county bond issue; the assert that bond issue is the direct result of illegal acts of the Commissioner of Education and the unconstitionality of the Education Act of Tennessee. As a result the School Board of Lincoln County and the County Court have been deprived of the right and duty to exercise independant discretion for the good of the schools and the financial stability of the county.

The Plaintiffs herein are not only taxpayers, they are parents and grandparents of children in the Lincoln County School system who will be seriously affected by the proposed consolidated school. There is no human motivation more powerful than the ties of family love, and every parent has a vital interest in the welfare of his child, which gives him a very personal and special interest in decisions made — legally or illegally — which may affect his child's education. It may warm the cockles of a school administrator's heart to visualize a giant consolidated school, but parents also have a right to their judgement as to what is best for their children, they may have entirely valid reasons for preferring that their children be educated near home in a small school where personal attention is more apt to be received, and this is an interest not shared either by citizens generally or by taxpayers.

If a school board illegally arrives at a decision to abandon existing schools and to subject all high school children to a consolidated-school environment, parents clearly have a right to contest the legality of such decision.

They have properly charged unconstitutional and illegal acts which threaten to inflict injury on the plaintiffs' interest as parents and these charges must be considered before any other matters are weighed.

In the case at bar in addition to taxpayers and parents, the children themselves are petitioning this honorable court and Chancery has a special regard for the rights and welfare of children: ". . . the court at all times having in view the best interest of the parties, and acting as would a prudent and considerate parent."* Too often, in these days, well meaning but misguided officials have lost sight of the welfare of the children in subjecting them to unnecessarily long and hazardous bus rides to distant destinations of doubtful educational or social value. They have forgotten the wise admonitions of *Pierce vs. Society of Sisters* wherein the U. S. Supreme Court said:

> "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

And, *Barnette vs. West Virginia* which stated:

> "As Governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing . . . If there is any fixed star in our constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The Declaratory Judgement Act

This is a Petition for a Declaratory Judgement and the question of "standing" must be viewed in the light of that fact.

The questions to be considered hereunder must be "real

*Gibsons Suits in Chancery, Second Edition, Paragraph 35

and not theoretical" and certainly we have in the instant case a real and present question. A comparable case is *Buntin v. Crowder*, 273 T 398, 118 S W² 221, where it was held:

> Where complainant is interested in having an act declared unconstitutional and the defendants are interested in having the act upheld, the parties are entitled to a ruling under this section. (The Declaratory Judgement Act)
>
> And liberal construction is required under the act:
> This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered. (T.C.A. 23-1113)

Plaintiffs herein fit perfectly, all requirements as set out by our Tenn Supreme Court in a 1965 case:

> The only requirement for a controversy such as will invoke the action of the Court and have it declare rights under this chapter are that the question must be real and not theoretical, the person raising it must have a real interest, and there must be someone having a real interest in the question who may oppose the declaration sought. It is not necessary that any breech be first committed, any right invaded or any wrong done. *Williams* v. *American Plan Corp.* (1965) 216 T 435, 392 S W² 920.

The principles envolved in the creation of the uniform Declaratory Judgement Act has been broadened even further in practice in modern times.

In the Vanderbilt Law Review, Vol. 24 at page 280, we find:

> As governmental power has grown, the court (U.S. Supreme Court) has simultaneously become more alert to the need for protection of the individual, and the concept of a citizens champion has moved increasingly to the fore.
>
> Parent's suits, *(Engle v. Vitale,* 370 US 421, (1962) Taxpayer's suits *(Flast v. Cohen,* 392 US 83, 1968) Busrider's suits *(Evers v. Dwyer* 358 US 202, 1958) and in Tennessee, a voter's suit *(Baker v. Carr)* have all been heard and the Plaintiffs granted standing. (The newly developed "nexus" requirement would be well met here by Parents and children).

The author of the Law Review article went on to say that "in light of these cases (and others), there is every indication that the courts will continue to encourage public interest litigation by private citizens."

But not in Tennessee because the Supreme Court of this State is apparently determined to apply Sanders vs. Carmichael to prevent Taxpayers or Parents from obtaining any relief in our Courts against state officials. On April 15, 1976 the Court in Stewart vs. Wakefield again cited Sanders as full and complete authority to deny to classes of Taxpayers and Parents any standing to sue "State officials."

The Court also held that the right to sue "local officials had been decided in "two previous Opinions" in the County (Giles). This in an apparent reference to White et al vs Warf et al. and Young et al vs Warf et al wherein the Court made the remarkable discovery that a case where taxpayers were found (erroneously) not to have standing then that case was res judicata to "all matters and issues."

The Supreme Court of Tennessee apparently realizing that a case dismissed for lack of standing does not dismiss it for matters and issues went further in its Stewart vs Wakefield opinion and said that not only should the case be dismissed for lack of standing "— but upon failure of the Complaint to state a claim for which relief could be granted particularly insofar as the referendum issue is concerned that issue having been so thoroughly disposed of on repeated occasions by this Court."

What about "particularly insofar" as other issues are concerned? Does that Court have some small doubt that there may be merit in some of the Complaint? — but not (certainly) on the referendum issue?

The Complaint did not ask for a construction of the

"referendum issue", but of a specific statute 49-201 (5) in its entirety. This the Court has *never* done.

This Tennessee Statute 49-201 (5) simply states:

> The duties of the Quarterly County Court shall be: (and 9 duties are listed, the 5th alone is here quoted)
>
> 5. To submit to the voters of the County at any regular session or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith.

The County Courts have ignored this provision and the Supreme Court has never construed this section in its entirety and has not done so here.

This is the same statute that is crucial to the Mitchel et al vs Carmichael (Ingram) and Mitchel et al vs Crawford et al.

The Tennessee Supreme Court in its Opinion cited a number of cases in support of its delusion that it has "repeatedly" considered the question of referendum and so also 49-201 (5) presented herein by Petitioners:

Wilds v. Coggins, 496 S. W. 2d 460 (Tenn. 1973)
State v. Safley, 192 Tenn. 385, 112 S. W. 2d 831 (1938)
Crewse v. Beeler, 186 Tenn. 475, 212 S. W. 2d 39 (1948)
Southern v. Beeler, 183 Tenn. 272, 283, 195 S. W. 2d 857 (1946)

But none of these authorities, cited by the Court, are recognized by Shephards Citations as dealing with the meaning of the statute in question, T.C.A. 49-201.

Appellants ask for an interpretation of T.C.A. 49-201; not T.C.A. 5-1001.

The cases cited by this learned Court (supra) *do not mention or discuss T.C.A. 49-201;* they do discuss T.C.A. 5-1001.

Appellants would most respectfully point out that T.C.A. 5-1001 is not T.C.A. 49-201. The language, intent, and powers granted, and the specific subject matter, are *different.*

Shephards Citations *does* list a number of cases wherein T.C.A. 49-201 *has* been interpreted. The statute has nine subsections. Some of the cases, cited by Shephards, consider subsections which are not in controversy here. But *Lamb vs. State* 338 SW2 584, 207 T 162, does deal with the second clause of the subsection in question here (5), and states that: "The statute provides that the duties of the Quarterly Court *shall be:*

> (5) To submit to the voters of the county, at any regular sessions, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, *upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith.*" (Emphasis supplied by Court.)

The second clause was underlined by the Court because the issue in that case was whether or not the County Court should be compelled by mandamus to issue bonds after an affirmative vote on the question by the voters.

This Court's description of T.C.A. 49-201 is interesting:

> "In the instant case we can not escape the fact that the statute hereinabove quoted (49-201) *plainly prescribes* a *specific* duty or act on the part of the County Court to be performed in that it is said *(there is no ambiguity in the statute at all)* that when a referendum has been had and the vote is in the affirmative then it becomes the duty, and is the duty of the County Court to issue said bonds in accord therewith." (Emphasis supplied.)

The Court then finally concluded that "*shall*" is mandatory language and affirmed the issuance of a mandamus.

None of the cases cited as authority by the Tennessee Supreme Court in its Opinion of April 15, 1976, is recognized by the Shephard Citators as having anything to do with the statute which petitioners have sought to have construed, and which this Court says it has construed in these cases.

Counsel has also read these cases and has been unable to find references to the statute on which the Petitioner's rely.

Counsel humbly recognizes that he is a mere advocate before the Court and does not enjoy the position of impartiality which the Court of course has, but Counsel believes, that a reasonable discussion of this Statute in language that would be understandable to citizens and lawyers and recorders of precedent such as the Shephard Citators would be useful. In *Joint Anti-Facist Refugee Committee vs. McGrath* 341 US 123, the United States Supreme Court said:

> "An appropriate governmental 'determination' must be the result of the process of reasoning. It can not be an arbitrary fiat contrary to the known facts. This is inherent in the meaning of 'determination'. It is implicit in a government of laws and not of men (341 US at 136)."

On the same subject, Justice Marshall said in relation to the proper performance of the judicial function in *Osborn v. Bank of the United States,* 9 Wheat. 738:

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can do nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of law." (9 Wheat . . ., at 866).

In the instant case, the Supreme Court of Tennessee and the Chancellor have used the "Judicial Power" condemned in *Osborn, supra,* i.e. we have opinion without rationale. (See T.C.A. 27-120)

THE CONSTITUTION OF THE COURT

In the hearing conducted by the Supreme Court on Mitchel et al v. Carmichael-(Ingram) et al and Mitchel et al Crawford et al (as well as Stewart et al vs Wakefield et al) Judge Henry recused himself because in former days he had represented Giles County in Young et al vs. Warf et al.

The remaining members failed to replace him as required by law thereby depriving litigants of a duly constituted Court and therefore due process.

In such case the Constitution and statutes provide only one means for replacing such incompetent judges: certification of the fact to the Governor who "shall forthwith specially commission the requisite number of men, of law knowledge, for trial and determination thereof". Article VI Section 11 Constitution of Tennessee. See also T.C.A. Sections 17-202, 17-203.

The four Judges were not sitting as a properly constituted Court.

> "The words 'due process of law,' when applied to judicial proceedings, . . . 'means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is by the law of its creation — to pass upon the subject-matter of the suit . . . .' "
>
> —*Scott v. McNeal,*
> 154 U.S. 34, 46 (1894)

And in the same case, this Court held that on review of the judgment of the highest court of the state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is not bound by the State court's construction of a statute of the territory, or of the State. 154 U.S. at 45.

More recently, this Court has said:

" 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice.' *Offcutt v. United States,* 348 U. S. 11, 14.' " [Emphasis by the Court.]

—*Estes v. Texas*
381 U.S. 532, 543 (1965)
quoting *In re Murchison,* 349 U.S.
133, 136 (1955)

And it is now well established in the opinions of this Court that "once established . . . avenues of [appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts," and that the appellate process of the states must meet the standards of both the equal protection and due process clauses of the Fourteenth Amendment. *Mayer v. Chicago,* 404 U.S. 189, 193 (1971), and cases there cited.

See also *Gibson v. Berryhill, . . . U.S. . . ., 36 L. Ed. 2d 488 (1973).*

CONCLUSION

Certiorari should be granted in this case on each of the questions to determine whether the procedure, results, and the constitution of the Tribunals below comport with the applicable requirements of the Constitution of the United States.

Respectfully submitted:

Jack Kershaw
3710 Lealand Lane
Nashville, Tennessee

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution

Article 4, Sec 4 Guaranty of republican form of government and against invasion.—The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convenced) against domestic violence.

AMENDMENT 14

§ 1. **Citizenship—Due process of law—Equal protection.**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tenn Constitution
Article I

Section 1. All power inherent in the people—Government under their control.—That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of those ends they have at all times, *an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.*

Sec. 2. Doctrine of nonresistance condemned.—That governemnt being instituted for the common benefit, *the doctrine of non-resistance against arbitrary power and*

oppression is absurd, slavish, and destructive of the good and happiness of mankind.

Sec. 5. Elections to be free and equal—Right of suffrage.—The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

Sec. 8. No man to be disturbed but by law.—That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Sec. 21. No man's services or property taken without consent or compensation.—That no man's particular services shall be demanded, or property taken, or *applied to public use,* without the consent of his representatives, or without just compensation being made therefor.

Article II, Sec. 1. "The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial."

Article II, §2, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

Article VI, §2, "The Supreme Court shall consist of five judges . . . The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law . . . "

Article VI, Sec. 11. Incompetency of judges—Special judges.—No Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by affinity of consanguinity, within such degrees as may be prescribed by law, *or in which he may have been of counsel,* or in which he may have presided in any inferior Court, except by consent of all the parties. In case all or any of the Judges of the Supreme Court shall thus be disqualified from presiding on the trial of any cause or causes, the Court, or the Judges thereof, shall certify the same to the Governor of the State, and he shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination therof. The Legislature may by general laws make provision that special Judges may be appointed, to hold any Courts the Judge of which shall be unable or fail to attend or sit; or to hear any cause in which the Judge may be incompetent. (Emphasis supplied)

Tennessee Code Annotated

16-330 Inferior courts—Supervisory control.—In order to insure the harmonious, efficient and uniform operation of the judicial system of the state, the Supreme Court of Tennessee is hereby granted and clothed with general supervisory control over all the inferior courts of the state. [Acts 1970 (Adj. S.), ch 422, §1.]

Cross-References. Vesting of judicial power, §16-101.

16-331 Supervisory procedures.—In addition to other constitutional, statutory and inherent power, but not restrictive thereof, the Supreme Court shall have the power: _____

e. To take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state.

f. To take all such other, further and additional action as may be necessary to the orderly administration of justice

within the state, whether or not herein or elsewhere enumerated. [Acts 1970 (Adj. S.), ch. 422, §2.]

Cited:Cantor v. Brading (1973), — Tenn. App. —, 494 S. W. (2d) 139.

16-332. Inherent power of court.—The general assembly hereby declares that §§ 16-330—16-333 are declaratory of the common law as it existed at the time of the adoption of the constitution of the state of Tennessee, and of the power inherent in a court of last resort. [Acts 1970 (Adj. S.), ch. 422, §3.]

Cited:Cantor v. Brading (1973), — Tenn. App.—, 494 S. W. (2d) 139.

16-333. Plenary and discretionary powers.—Sections 16-330—16-333 shall constitute a broad conference of full, plenary and discretionary power upon the Supreme Court. [Acts 1970 (Adj. S.), ch. 422, §4.]

27-120. Written opinions in Supreme Court.—The judges of the Supreme Court shall give written opinions, stating the points of law on which the action of the court is based, in all cases determined by them, except actions in which there is no defense. [Code 1858, §3931 (deriv. Acts 1829, ch. 60, §2); Shan., §5735; Code 1932, §9924.]

49-201. Duties of quarterly county court.—The duties of the quarterly county court shall be:

(1) To elect members of the county board of education and to fill all vacancies on said board except in counties where the board is elected by the people; also to elect county superintendents in certain counties where this is required by law; and to fill a vacancy when it occurs in the office of county superintendent, where they have elected same.

(2) To consider, on the recommendation of the county board of education, school budgets for the county elementary and county high schools, and to provide necessary funds to enable said county board to meet all obligations under the adopted budgets.

(3) To require the county board of education, through the

county superintendent, to make a quarterly report of the receipts and expenditures of the public school funds, the needs of the county elementary and the county high schools, the progress made in their development and such other information as to the administration of the public schools as it may require.

(4) To require its finance committee to examine the accounts of the county board of education quarterly, or at any other time it may appear that said county board is misusing any of the public school funds, or exceeding the budget adopted by said court; or it may appoint a competent auditor to make said examination, the cost of such examination to be paid out of county funds.

(5) *To submit to the voters of the county,* at any regular session, or at any special session called for that purpose, the proposition to issue bonds for the purpose of purchasing grounds, erecting and furnishing school buildings, and, upon the affirmative vote of the majority cast in said election, to issue said bonds in accord therewith.

(6) To levy such tax as may be necessary to pay interest on bonds and to provide a sinking fund to retire same at maturity.

(7) To levy such taxes for county elementary and county high schools as may be necessary to meet the budgets submitted by the county board of education and adopted by the quarterly county court.

(8) To levy sufficient taxes or provide funds by bond issues by the voters for the purchase of school grounds, the erection and repair of school buildings, and for equipping the same; provided, same shall have been provided for by the quarterly court, or that said court shall have approved the authorization of same by the county board of education.

(9) To provide sufficient funds to erect a suitable building and maintain at least one (1) first-class four (4) year high school according to the provisions of this title. [Acts 1925, ch. 115, §9; Shan, Supp., §1487a55; mod. Code 1932, §2346.]

49-701. Issuance by county courts authorized.—The counties through their respective quarterly county courts *are authorized* to issue and sell bonds for the purposes and in the manner provided in this chapter. [Acts 1911, ch. 60, §1; Shan., §1442a5; mod. Code 1932, § 2557.]

49-702. Resolution for issuance—Maximum amount outstanding.—Said bonds *may* be issued by the quarterly county court of any county by resolution adopted by a majority of the members of said quarterly county court at any regular, special or adjourned meeting thereof. [Acts 1911, ch. 60, § 11; Shan., § 1442a15; Code 1932, § 2567; Acts 1947, ch. 102, § 3; 1949, ch. 240, § 1; C. Supp. 1950, § 2567; Acts 1957, ch. 92, § 1; 1963, ch. 165, § 1.]

49-102. Administration of system.—The system of public education shall be administered from the state level by (1) the commissioner of education, and (2) the state board of education. There shall be a local public school system operated in each county. There may be a local public school system operated in a municipality or special school district. Any local public school system shall be administered by (1) a local board of education, and (2) a superintendent or director.

Hereinafter in this title, unless specifically designated otherwise, the term school system, public school system, local school system, school district, or local school district shall mean and shall include any county school system, city school system, special school district, unified school system, metropolitan school system, or any other local public school system or school district created or authorized by the general assembly of the State of Tennessee and the term board, local board, or local board of education shall mean and shall include the board of education which manages and controls the respective local public school system. [Acts 1925, ch. 115, § 2; Shan. Supp., § 1487a16; Code 1932, § 2307; Acts 1974 (Adj. S.), ch. 654, § 1.]

49-602. Emergency closing of schools.—Whenever the operation of schools in any county, city, or special district

shall be suspended by reason of epidemic, flood, or other justifiable cause, if so determined by the state board of education, upon the written petition by the local board of education, such suspension shall not operate to deprive any county, city, or special school district of state school funds to which such county, city, or special school district would otherwise be entitled. [Acts 1937, ch. 86, § 1; C. Supp. 1950, § 2417.1; Acts 1957, ch. 144, § 1.]

49-713. Use of fund.—The proceeds of said sale of said bond shall constitute a special fund to be known as "special school fund." (except funds for aiding the state of Tennessee in construction of state education facilities or institutions as provided for in the paragraph below), which shall be kept by the trustees of said county and the treasurer of said city schools separate and apart from all other funds and shall be applied exclusively to purchase property for school purposes, to purchase sites for school buildings, to erect or repair school buildings, to furnish and equip school buildings and to refund, call or make principal and interest payments on bonds previously issued for the same purposes, and to be used for no other purposes by the county board of education of said county or by the city board of education, or the governing board of the city, which said city board shall have a right to draw warrants on said funds, for said purposes only.

Funds may also be raised by counties in this state in accordance with the provisions of this chapter for the purpose of contributing or granting the same to the state of Tennessee to aid in the constructing and equipping of any type of state educational facilities or institutions within the boundaries of such counties, or neighboring counties nearby enough so that the contributing county will be directly benefited by such facilities or institutions, either separately or in conjunction with other political subdivisions. Funds for this latter purpose shall be paid to the state of Tennessee immediately upon the sale of bonds for that purpose by such

counties rather than being kept by the trustee in such counties as a part of the "special school fund" provided for above.

The provisions of § 49-711, of this Code "Proportional Payments to Cities," shall not apply when the proceeds from the bonds are to be used for this last purpose mentioned. [Acts 1911, ch. 60 § 10; Shan., § 1442a14; Code 1932, § 2566, Acts 1959, ch. 254 §1; 1961, ch. 269, § 2; 1965, ch, 134, §1; 1975, ch. 223, § 1.]

49-1105. Senior high school in county required—Number of pupils required for additional schools.—There shall be maintained in each county of the state one (1) senior high school which shall give at least one (1) full course of study approved by the state board of education. Local boards of education may establish additional high schools; provided, that no junior high school of form I shall be established and maintained with fewer than seventy-five (75) pupils in average daily attendance; and that no junior high school of form II may be established and maintained with fewer than one hundred (100) pupils in average daily attendance, thirty (30) of whom shall have completed the eighth grade or its equivalent; and that no junior high school of form III shall be established and maintained with fewer than one hundred fifty (150) pupils in average daily attendance; sixty (60) of whom shall have completed the eighth grade or its equivalent; and that no senior high school shall be established and maintained with fewer than three hundred (300) pupils in average daily attendance; provided that any senior high school in a state of transition may be initially established with fewer than three hundred (300) pupils in average daily attendance, provided that as soon as the period of transition has been completed that such senior high school shall not have fewer than three hundred (300) pupils in average daily attendance; provided further that nothing in this chapter shall prohibit the consolidation of any two (2) or more high schools now established, into one (1) high school, even

though the combined average daily attendance of the pupils in such consolidated high school is less than that required in this chapter; and provided that nothing in this chapter shall be construed as abolishing any high school now established. It is further provided that local boards of education may, in unusual circumstances, establish and maintain high schools with fewer pupils in average daily attendance than is prescribed herein; provided that prior approval for such is granted by the state commissioner of education and the state board of education upon request of the respective local board of education. It is also further provided that local boards of education shall designate the schools which the pupils shall attend. [Acts 1925, ch. 115, § 14; Shan. Supp., § 1487a94; Code 1932, § 2385; Acts 1931, ch. 71, §; 1937 (2nd E. S.), ch. 6, § 1; 1937 (3rd E. S.), ch. 15, § 1; 1943, ch. 65, § 1; mod. C. Supp. 1950, § 2393.7; Acts 1957, ch. 145, § 1; 1961, ch. 137, § 1; 1974 (Adj. S.), ch. 654, § 50.]

49-105. Powers and duties of commissioner. — The commissioner shall be, ex officio, member and chairman of the state board of education, and shall have a vote on all questions coming before the board, and it shall be the duty of said commissioner of education:

(1) To appoint all heads and subordinates in the department and divisions thereof, except supervisor of agriculture, supervisor of trades and industry, supervisor of home economics, supervisor of rehabilitation who shall be elected by the state board of education, who shall fix their compensation subject to the approval of the federal board, if required, except teachers and other county school officers. All appointments made by the commissioner shall be made subject to the governor's approval.

(2) To collect and publish statistics and other information relative to the public school system.

(3) To make tours of inspection and survey among the public schools throughout the state and to direct supervision through the divisions of the department.

(4) To require all teachers to attend county institutes or educational meetings on the date, at the hour and place designated by the county superintendent; provided, schools shall not be suspended for more than ten (10) days in one (1) year, and, provided further, that the place of such meeting shall be in the county where the school is located.

(5) To see that the school laws and the regulations of the state board of education are faithfully executed.

(6) To prepare and distribute blank forms for all reports required by law or by said commissioner to be made by teachers, boards of education, superintendents, county trustees, and all other state, county, and city officers.

(7) To print and distribute to the local boards of education and all state, county and city school officers copies of the school law.

(8) To require of all state and local public school officers and heads of state educational institutions under the department of the state board of education detailed reports annually, and, in case of emergency, he may require special reports at any time of any officer connected with the public school system.

(9) To appoint someone to make reports required to be made by the state or local public school officers and head of state institutions named herein when such officers shall fail to make full and accurate report at the time designated and to allow such appointee compensation not to exceed five dollars ($5.00) per day for the time actually employed in making such report for his service which shall be paid by the delinquent public school officer or head of state educational institution. Upon the refusal of said delinquent officer or head of state educational institution to pay such compensation the commissioner shall deduct that amount out of the state supplement to his salary or compensation and require the county trustee or other custodian of public school funds to withhold said amount out of any salary which may be due such delinquent officer.

(10) * * *

(14) To revoke when charges are made and approved by the superintendent and local board of education upon sufficient evidence the certificate of any teacher, principal, supervisor, or other school official who is guilty of immoral conduct, provided, that said teacher, principal, supervisor, or other official shall be given ten (10) days' notice in writing and an opportunity to appear in defense.

(15) Whenever it shall appear to the commissioner of education from the report of any school official or from any other reliable source that any portion of the school fund has been lost, misappropriated, or in any way illegally disposed of, or not collected, or is in danger of loss, misappropriation, illegal disposition or failure of collection, the commissioner may call upon the district attorney or county judge or chairman of the county court, or the county attorney, to protect, recover, or force collection of such funds, provided the governor shall first give his approval to such action. This provision, however, shall not prohibit suits by one political subdivision against another political subdivision in the same county, or against the county, when the consent of the state commissioner of education and the governor has not been obtained. The state commissioner of education, with the consent of the governor and with the approval of the attorney-general, is hereby authorized to employ private legal counsel in order to protect, recover, or force collection of any school funds.

The commissioner shall have authority to send a supervisor or supervisors as herein provided for, to any local school system to make investigation of public school accounts, records, and files of any official handling the school funds or administering the public school system, and to enforce all school laws and regulations of the commissioner of education provided that this duty of the commissioner shall not be exercised until the local board of education shall have requested such investigation.

(16) To supervise high schools and to furnish blank forms in accord with the provisions of this title.

(17) To prescribe regulations regarding the display of flags on public school buildings.

(18) To require the heads of divisions under his direction who handle state funds to give bonds sufficient to cover any liability to the state.

(19) To inspect, approve and classify such private schools of grades one (1) through twelve (12), as well as nursery schools and/or kindergartens, or any combination of these, as shall request such inspection, approval, and classification; provided that the same standards as are used for the approval and classification of the public schools shall be used for such inspection, approval, and classification. [Acts 1925, ch. 115, § 4; Shan. Supp., § 1487a23; Code 1932, § 2314; Acts 1933, ch. 129, §; C. Supp. 1950, §2314; impl. am. Acts 1951, ch. 58; 1957, ch. 91, §§ 1, 2; 1961, ch. 106, § 1; 1961, ch. 160, § 1; 1963, ch. 13, § 1.]

49-604. B. In order for any public school system to receive the state funds appropriated for the minimum foundation school program as determined in § 49-603, such system shall meet the following *conditions and requirements*. In order to enforce the same, the state commissioner of education may, *in his discretion*, withhold a portion or all of the state school funds which the system is otherwise eligible to receive.

1. Every school system shall meet the requirements of state law as to the operation of such system.

2. Every school system shall meet the rules, regulations, and minimum standards established by the state board of education for the location, construction, and operation of schools.

3. Every school in every school system shall meet the requirements of the state board of education for an approved school. [Acts 1925, ch. 115, § 17; Shan. Supp., § 1487a124; Code 1932, § 2416; Acts 1972 (Adj. S.), ch. 693, § 6.]

20-210. Process to other counties. — Process in local actions may run to any county. [Code 1858, § 2820; Shan., § 4525; Code 1932, § 8652.]

Text Books. History of a Lawsuit (7th Gilreath), § 42.

Collateral References. 72 C. J. S., ed., 42.

20-211. Counterpart summons. — Where there are two (2) or more defendants in any suit in courts of law or equity, or before justices of the peace, the plaintiff may cause counterpart summons or subpoena to be issued to any county where any of the defendants is most likely to be found, the fact that the counterpart process is issued in the same suit being noted on each process, which, when returned, shall be docketed as if only one process had issued. If the defendants are not served, the same proceedings shall be had as in cases of other similar process not executed. Such counterpart, when issued from a justice, shall be returned within thirty (30) days. [Code 1858, §§ 2821, 2822 (deriv. Acts 1820, ch. 25, § 3); Shan., §§ 4526, 4527; Code 1932, §§ 8653, 8654.]

16-624. Action in personam. — The court of chancery acts ordinarily in personam, and suit may be instituted wherever the defendant, or any material defendant, is found, unless otherwise prescribed by law. [Code 1858, § 4305; Shan., § 6115; Code 1932, § 10383.]

16-626. Process to other counties in general. — In like manner, if the suit is properly instituted, attachments, injunctions, and all other process known to the court, and necessary to attain the ends of justice, may be issued to any other county. [Code 1858, § 4307; Shan., § 6117; Code 1932, § 10385.]

16-617. Venue of suits. — The local jurisdiction of the court of chancery is also subject to the following rules:

(1) The bill may be filed in the county in which the defendant or a material defendant resides, and if, upon inquiry at his residence, he is not to be found, he may be proceeded against by publication or judicial attachment.

(2) All bills filed in any court seeking to divest or clear the title to land, or to enforce the specific execution of contracts relating to realty, or to foreclose a mortgage or deed of trust by a sale of personal property or realty, shall be filed in the county in which the land, or a material part of it, lies, or in which the deed or mortgage is registered.

(3) Bills seeking to enjoin proceedings at law may be filed in the county in which the suit is pending, or to which execution has issued.

(4) Bills against nonresidents, or persons whose names or residences are unknown, may be filed in the county in which the cause of action arose, or the act on which the suit is predicated was to be performed, or in which is the subject of the suit, or any material part thereof.

(5) When attachment of property is allowed in lieu of personal service of process, the bill may be filed in the county in which the property, or any material part thereof, sought to be attached, is found at the commencement of the suit. [Code 1858, § 4311 (deriv. Acts 1787, ch. 22, § 1; 1801, ch. 6, § 2; 1825, ch. 22, §§ 1, 2; 1827, ch. 42, § 1; 1833, ch. 52); Acts 1877, ch. 107, § 1; Shan., § 6121; Code 1932, § 10388.]

DECLARATORY JUDGMENTS

23-1101. Definition of person. — The word "person" wherever used in this chapter, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or *municipal* or *other corporation of any character whatsoever.* [Acts 1923, ch. 29, § 13; Shan. Supp., § 4726a13; Code 1932, § 8847.]

23-1103. Construction of statutes and written instruments. — *Any person interested* under a deed, will, *written contract, or other writings* constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising

under the instrument, *statute,* ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder. [Acts 1923, ch. 29, § 2; Shan. Supp., § 4726a2; Code 1932, § 8836.]

23-1107. Parties to proceedings. — When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, *such municipality shall be made a party,* and shall be entitled to be heard, and if the statute, ordinance, or franchise is of statewide effect and is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard. [Acts 1923, ch. 29, § 11; Shan. Supp., § 4726a11; Code 1932, § 8845; mod. C. Supp. 1950, § 8845.]

BONDS AND NOTES

5-1024. Election — When required. — No vote of the registered voters upon a proposition for the issuance of bonds by any county shall be necessary if the said initial resolution is adopted by a majority of the members of the governing body of such county unless within ten (10) days of the date of publication or posting, as the case may be, of the initial resolution so adopted, a petition, signed by at least ten per cent (10%) of the registered voters of the county, or of that portion thereof which is liable to be taxed therefor, as the case may be, shall have been filed with the county court clerk protesting the issuance of the bonds. If a petition protesting the issuance of such bonds signed by as many as ten per cent (10%) of the registered voters as aforesaid shall have been filed with the county court clerk within ten (10) days from the publication or posting of the initial resolution, then no bonds shall be issued without the assent of a majority of the registered voters affected thereby voting

upon a proposition for the issuance of such bonds in the manner provided by § 5-1025. No registered voter shall be permitted to withdraw his signature from such petition after signing the same. Notwithstanding any of the provisions of this section the governing body of the county may if it desires call an election as provided herein for the purpose of ascertaining the will of the registered voters with respect to the issuance of the bonds. [Acts 1957, ch. 224, § 1; 1972 (Adj.S.), ch. 740, § 4(6).]

5-1001. Popular vote to authorize bonds — Exceptions. — Any bonds authorized to be issued by any of the counties, upon the faith and credit of such county, for public purposes, shall only be upon an election to be first held by the registered voters of such county and the assent of a majority of the votes cast in said election; provided, that nothing in this section shall be construed as applicable to renewal or refunding bonds; provided, further, that nothing in this section shall be construed as applicable to the issuance of bonds for the building of a courthouse in any county in which the courthouse has been destroyed. Nothing in this section shall interfere with or affect any present enabling act for state and federal aid for the construction of state and federal roads. [Acts 1923, ch. 69, §§ 1, 2; Shan. Supp., §§ 6054a11, 6054a12; Code 1932, §§ 10248, 10249; Acts 1931, ch. 13, § 1; C. Supp., 1950, § 10248; Acts 1972 (Adj.S.), ch. 740, § 4(4).]

TENN RULES OF CIVIL PROCEDURE

12.08. Waiver of Defenses

A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or, if he has made no motion, in his answer or reply, or any amendments thereto, (provided, however, the defenses enumerated in 12.02(2), (3), (4) and (5) shall not be raised by amendment), except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to

state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 in the light of any evidence that may have been received.

Committee Comment: Rule 12.08 specifies that, in general, defenses not raised by motion or answer are waived, but the waiver does not apply to the defense of lack of jurisdiction over the subject matter and certain other specified defenses relating to statement of legally sufficient claim or defense, or to failure to join necessary parties. *The parties cannot by waiver or otherwise confer jurisdiction over the subject matter,* and the other exceptions relate to questions which should not be waived; the defects they rely upon can be remedied by amendment if facts permit, and if the facts do not permit an amendment, the defects are of such importance that the defenses based thereon should not be waivable by failure to present them at the earliest opportunity.